TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 216.

HENRY P. CLARKE, PLAINTIFF IN ERROR,

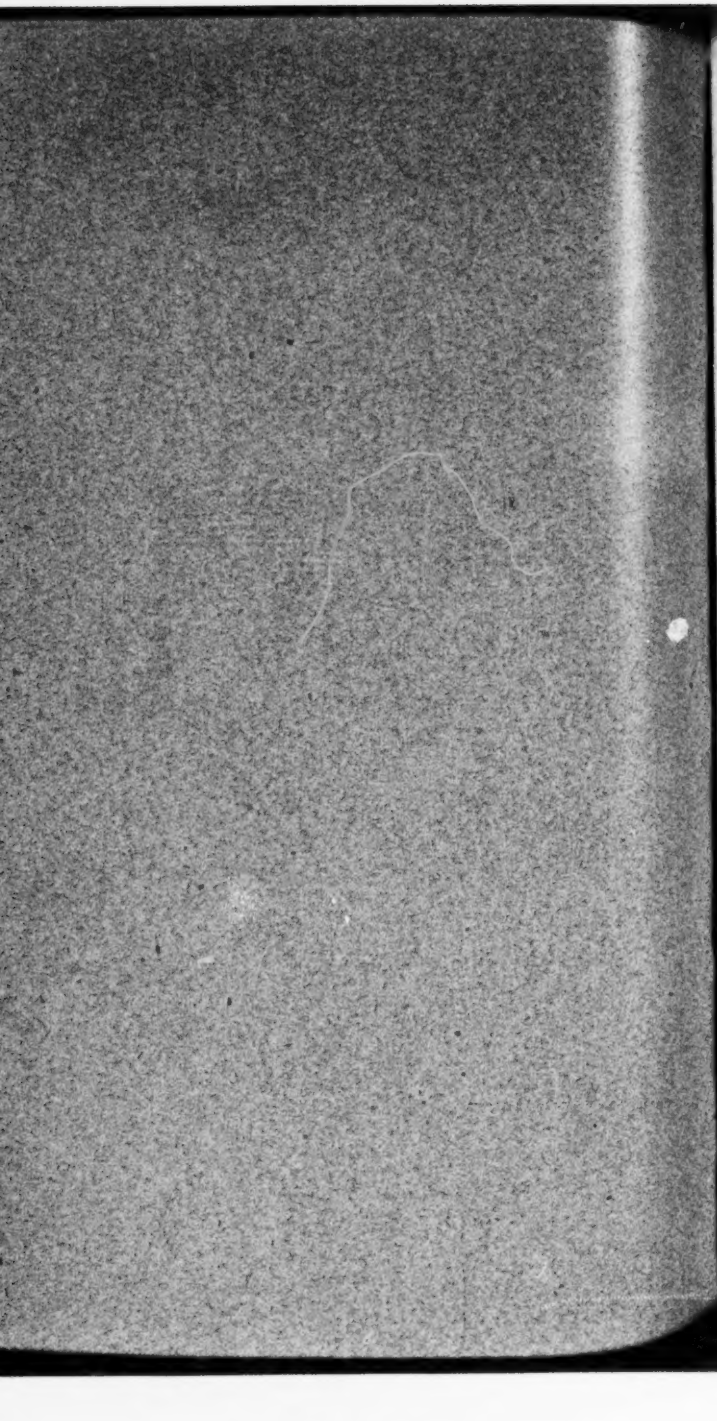
vs.

NANCY B. CLARKE, JOHN H. PERRY, GUARDIAN AD LITEM OF NANCY B. CLARKE, AND HENRY P. CLARKE, AS ADMINISTRATOR OF THE PERSONAL ESTATE OF JULIA CLARKE, DECEASED.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

FILED FEBRUARY 18, 1899.

(17,303.)



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 718.

HENRY P. CLARKE, PLAINTIFF IN ERROR,

vs.

ANCY B. CLARKE, JOHN H. PERRY, GUARDIAN AD LITEM OF NANCY B. CLARKE, AND HENRY P. CLARKE, AS ADMINISTRATOR OF THE PERSONAL ESTATE OF JULIA CLARKE, DECEASED.

ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 11, 1899.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of errors of the State of Connecticut, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of errors, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Henry P. Clarke, appellant, and Nancy B. Clarke, John H. Perry, guardian *ad litem* of Nancy B. Clarke, and Henry P. Clarke as administrator of the personal estate of Julia Clarke, deceased, appellees, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in ques-

2 tion the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eighth day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

3 [Endorsed:] 1. Supreme Court of the United States. Henry P. Clarke, plaintiff in error, *v.* Nancy B. Clarke, John H.

Perry, guardian *ad litem* of Nancy B. Clarke, and Henry P. Clarke as adm'or of the personal estate of Julia Clarke, dec'd, d'f'ts. Writ of error. Or'g'l.

4 UNITED STATES OF AMERICA, *ss:*

To Nancy B. Clarke, John H. Perry, guardian *ad litem* of Nancy B. Clarke, and Henry P. Clarke as administrator of the personal estate of Julia Clarke, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of errors of the State of Connecticut, wherein Henry P. Clarke is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this eighth day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

5 [Endorsed:] 3. The Supreme Court of the United States. Henry P. Clarke, plaintiff in error, *v.* Nancy B. Clarke, John H. Perry, guardian *ad litem* of Nancy B. Clarke, and Henry P. Clarke as adm'or of the personal estate of Julia Clarke, d'f'ts in error. Citation in error. Or'g'l.

[Endorsed:] Due and legal service acknowledged Dec'r 22, 1898. Henry P. Clarke as adm'or of Julia Clarke. Due and legal service acknowledged Feb'y 9, 1899. Jno. H. Perry, guardian *ad litem* for Nancy B. Clarke.

On this 24th day of December, in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared A. H. Oliver before me, the subscriber, Z. W. Nichols, notary public, and makes oath that he delivered a true copy of the within citation to Nancy B. Clarke.

A. H. OLIVER.

Sworn to and subscribed the 24 day of December, A. D. 1898.

{ Seal of Z. W. Nichols, Notary Public, Transylvania County, N. Carolina. }

Z. W. NICHOLS,
Notary Public.

6 Know all men by these presents that we, Henry P. Clarke, as principal, and George W. Waring, as surety, are held and firmly bound unto Nancy B. Clarke, John H. Perry, guardian *ad*

litem of Nancy B. Clarke, and Henry P. Clarke, administrator of the personal estate of Julia Clarke, deceased, in the full and just sum of five hundred dollars, to be paid to the said obligees, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of ——, A. D. 1898.

Whereas lately, at a session of the supreme court of errors of the State of Connecticut, in a suit depending in said court between the principal of this bond, obligor, plaintiff in error, and the said obligees, defendants in error, a judgment was rendered against the said plaintiff in error, and the said plaintiff in error having
7 obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said defendants in error, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said plaintiff in error shall prosecute said writ of error to effect and answer all costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) HENRY P. CLARKE. [L. S.]
(Signed) GEO. W. WARING. [L. S.]

Sealed and delivered in the presence of—
(Signed) JOS. J. MOORMAN.

THE STATE OF SOUTH CAROLINA, }
County of Richland. }

Personally appeared before me Joseph J. Moorman and made oath that he saw the within-named Henry P. Clarke and
8 George W. Waring sign, seal, and as their act and *and* deed deliver the within written bond.

(Signed) JOS. J. MOORMAN.

Sworn to and subscribed before me this — day of ——, 1898.
(Signed) J. S. VERNER, *N. P., S. C.*

[NOTARIAL SEAL.]

THE STATE OF SOUTH CAROLINA, }
County of Richland. }

Personally appeared before me Henry P. Clarke and George W. Waring and severally swear each of and for himself that he is worth the sum of five hundred dollars, over all his debts and liabilities and exclusive of property exempt by law from execution.

(Signed) HENRY P. CLARKE.
(Signed) GEO. W. WARING.

Sworn to and subscribed before me this — day of ——, A. D. 1898.

(Signed) JOHN S. VERNER,
Notary Public, S. C.

[NOTARIAL SEAL.]

Approved:
(Signed) R. W. PECKHAM,
Associate Justice Supreme Court U. S.

9 [Endorsed:] 7. Bond of Henry P. Clarke and Geo. W. Waring to Nancy B. Clarke, John H. Perry, guardian *ad litem* of Nancy B. Clarke, and Henry P. Clarke, adm'r of the personal estate of Julia Clark, dec'd. Copy.

10 HENRY P. CLARKE, Plaintiff in Error,
v.
NANCY B. CLARKE, JOHN H. PERRY, Guardian *ad Litem* of Nancy B. Clarke, and Henry P. Clarke, as Administrator of the Personal Estate of Julia Clarke, Deceased, Defendants in Error.

The plaintiff in error makes the following assignment of errors, which he avers occurred in the final judgment of the supreme court of errors of the State of Connecticut, April term, 1898, herein: That error was committed in deciding against the right specially set up and claimed by him under article four, section one, Constitution of the United States, in this, that full faith and credit were not given to the judicial proceedings of the State of South Carolina, to wit, to the judgment of the court of common pleas for Richland county, South Carolina, and the judgment of the supreme court of
11 the State of South Carolina, March 18, 1896, affirming the same, in the case of Henry P. Clarke, as executor of the last will and testament of Julia H. Clarke and trustee of the estate of Nancy B. Clarke under said will, against Nancy B. Clarke, ordering, adjudging, and decreeing that the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personaltys at the time of her death of all her real estate, of whatsoever description and wheresoever situated, and that Henry P. Clarke, as executor, receive, administer, and account for the same as personalty, and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree; and in deciding, on the contrary, that the will of said
12 Julia H. Clarke did not work an equitable conversion into personalty at the time of her death of the real estate of the said Julia H. Clarke, situate in the State of Connecticut, and that the said Nancy B. Clarke, defendant in error, was sole heir of a certain undivided interest of the real estate of the said Julia H. Clarke, in the State of Connecticut, which interest passed as real estate under her said will; and the plaintiff prays that the said judgment be reversed and altogether held for naught, and that he

may be restored to all things which he hath lost by occasion of said judgment.

LE ROY F. YOUMANS,
Att'y for P'ff in Error.

13 [Endorsed:] 9. Henry P. Clarke, plaintiff in error, *v.* Nancy B. Clarke, John H. Perry, guardian *ad litem* of Nancy B. Clarke, and Henry P. Clarke, as adm'r of the personal estate of Julia Clarke, def'ts in error. Assignment of errors and prayer for reversal. Le Roy F. Youmans, att'y for pl'ff in error. Copy.

14 HENRY P. CLARKE, Plaintiff in Error,
v.
NANCY B. CLARKE, JOHN H. PERRY, Guardian *ad Litem* of Nancy B. Clarke, and Henry P. Clarke as Administrator of the Personal Estate of Julia Clarke, Deceased, Defendants in Error.

To the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States:

The petition of the above-named plaintiff in error showeth that at April term, 1898, the supreme court of errors of the State of Connecticut, the highest court of that State in which a decision could be had, entered a final judgment herein in favor of the defendant Nancy B. Clarke against the plaintiff in error, in which judgment certain errors were committed to the prejudice of the plaintiff in error, among which are these, to wit: In deciding against the right specially set up and claimed by the said plaintiff
15 in error under article four, section one, Constitution of the United States, in this, that full faith and credit were not given to the judicial proceedings of the State of South Carolina, to wit, to the judgment of the court of common pleas for Richland county, South Carolina, and the judgment of the supreme court of the State of South Carolina, March 18, 1896, affirming the same in the case of Henry P. Clarke, as executor of the last will and testament of Julia H. Clarke and trustee of the estate of Nancy B. Clarke under said will, against Nancy B. Clarke, ordering, adjudging, and decreeing that the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personalty at the time of her death of all her real estate of whatsoever description and wheresoever situated, and that Henry P. Clarke, as executor, receive, administer, and account for the same as personalty, and that he is by the said
16 will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree, and in deciding, on the contrary, that the will of said Julia H. Clarke did not work an equitable conversion into personalty at the time of her death of the real estate of the said Julia H. Clarke situate in the State of Connecticut, and that the said Nancy B. Clarke, defendant in error, was sole heir of a certain undivided interest of the real estate of the said Julia H. Clarke in the State of Connecticut, which interest passed as real estate under her said will. Wherefore

the plaintiff in error prays that a writ of error may issue in this behalf to the supreme court of errors of the State of Connect-
17 icut for the correction of errors so complained of, and that a transcript of the record and proceedings in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

LE ROY F. YOUMANS,
Attorney for Plaintiff in Error.

December 7, 1898.

[Endorsed:] 11. Henry P. Clarke *v.* Nancy B. Clarke, John H. Perry, guardian *ad litem* of Nancy B. Clarke, and Henry P. Clarke as adm'or of the personal estate of Julia Clarke, dec'd. Petition for writ of error. Le Roy F. Youmans, att'y for Henry P. Clarke.

18 To all persons to whom these presents shall come, Greeting:

In pursuance of the command of the writ of error within, I, William R. Shelton, clerk of the supreme court of errors of the State of Connecticut for the third judicial district, herewith transmit a true copy of the record and all proceedings in the case of Henry P. Clarke's appeal from probate, lately pending in the supreme court of errors of the State of Connecticut for the third judicial district, in the words and figures following, to wit:

Seal Supreme Court of Errors, Conn.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Bridgeport, in said State of Connecticut, this 16th day of February, 1899.

WM. R. SHELTON, *Clerk.*

19 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Reservation.

Supreme Court of Errors, Third Judicial District, October Term, 1897.

Application of Henry P. Clarke, Administrator.

Estate of JULIA CLARKE, late of Columbia, South Carolina, but Leaving Real Estate in this District, Deceased.

To the honorable probate court for the district of Bridgeport:

The petition of the subscriber respectfully showeth:

1st. That the deceased, whose estate is now in course of settlement in this district, died intestate and possessed of real estate in this district, as appears more fully by the inventory filed May 28, 1897.

2nd. That divers persons claim to be entitled to have the said real estate set out and distributed to them.

Wherefore, your petitioner makes request that the court hears

ir claims and ascertain to whom this estate shall be set out and tributed.

(Signed) HENRY P. CLARKE,
Administrator,
By STODDARD & BISHOP,
His Attorneys.

Dated at Bridgeport, this 29th day of May, 1897.

STRICT OF BRIDGEPORT, } ss:
Probate Court, }

tate of JULIA CLARKE, Late of the City of Columbia, South Caro-ina, Deceased, but Leaving Real Estate in the City of Bridgeport, n said District.

MAY 29, 1897.

Upon the application of Henry P. Clarke, administrator on said ate as per application on file more fully appears, it is—

Ordered, that said application be heard and determined at the bate office, in Bridgeport in said district, on the 14th day of ne, A. D. 1897, at 11 o'clock in the forenoon, and that notice be n of the pendency of said application and the time and place hearing thereon, by sending by mail, postage paid, a copy of said lication and of this order to the parties in interest on or before ne 1st, 1897, and return make to this court.

ALBERT M. TALLMADGE, *Judge.*

Order of Probate Court Ascertaining Heir and Distributee.

At a court of probate holden at Bridgeport, within and for the trict of Bridgeport, on the third day of July, 1897.

the Matter of the Application of HENRY P. CLARKE, Administrator of the Intestate Estate of JULIA CLARKE, Praying This Court to Ascertain the Heirs and Distributees of said Estate.

The application aforesaid came to this court on the 29th day of ay, 1897, and notice of the hearing thereon was given by the applicant, in all respects according to the order pertaining thereto as file. This court further finds that Nancy B. Clarke hereinafter med, received actual notice thereof.

At the time named in said order the applicant appeared. The urt found that the deceased died at the age of about five months, aving her surviving a father, the said Henry P. Clarke, but no other, and a sister, Nancy B. Clarke, of Columbia, in the State of uth Carolina, but no other brothers or sisters or issue of deceased others or sisters, and that the said Nancy B. Clarke is a minor out eight years of age.

Whereupon this court appointed John H. Perry, Esq., of Fairfield, Fairfield county, guardian *ad litem* for the said Nancy B. Clarke, by said appointment on file will more fully appear. Said mat-r came thence by continuance to the present time, when the said

applicant and the said guardian *ad litem* appeared and were fully heard thereon.

Upon such hearing, this court finds that the intestate was domiciled in the State of South Carolina at the time of her decease; that the entire inventoried assets of her estate in this State consist of an undivided interest in certain real estate, situated in the town of Bridgeport, of the value of about $—, which said interest was derived from the will of her mother, Julia H. Clarke, who died about four months prior to the decease of the intestate domiciled in the State of South Carolina, an exemplified copy of whose will "and the decision of the supreme court of South Carolina interpreting the same in a case in which the petitioner herein was plaintiff and Nancy B. Clarke was defendant," is on file and of record in this court and hereby referred to, and whose estate is as yet unsettled and undistributed.

Wherefore this court finds and decrees that the sole heir and distributee of the estate of the intestate is her aforesaid sister, Nancy B. Clarke.

ALBERT M. TALLMADGE, *Judge.*

21 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Court of Probate, District of Bridgeport, July 21, 1897.

In re Estate JULIA CLARKE, Late of the City of Columbia, State of South Carolina, Deceased, but Leaving Estate in This District.

To the honorable court of probate in and for the district of Bridgeport, in the county of Fairfield, State of Connecticut, Greeting:

Henry P. Clarke, of the city of Columbia, State of South Carolina, respectfully represents:

1. That he is the father and only surviving parent of the said Julia Clarke, deceased.

2. That he is an heir-at-law and distributee of the estate of the said Julia Clarke, deceased.

3. That he is aggrieved by the order and decree of this court, made on the 3rd day of July, A. D. 1897, as by said decree on file more fully appears, declaring one, Nancy B. Clarke, of said city of Columbia, to be the sole heir and distributee of the estate of the said Julia Clarke, deceased.

The said Henry P. Clarke therefore moves an appeal from the said decree of this court of probate to the superior court, to be holden in and for the county of Fairfield, and State of Con-
22 necticut (in which county said court of probate was held) on the first Tuesday of September, A. D., 1897, and he offers and files a sufficient bond with surety to the State of Connecticut, to prosecute said appeal to effect and answer all damages in case he fail to make his said appeal and plea therein good.

Dated at Bridgeport this 21st day of July, 1897.

HENRY P. CLARKE,
By STODDARD & BISHOP,
His Attorneys.

At a court of probate held at Bridgeport, in and for the district of Bridgeport, on the 24th day of July, A. D. 1897.

Estate of JULIA CLARKE, Late of Columbia, South Carolina, Deceased.

Whereas, Henry P. Clarke, of said Columbia, appeared in court and filed his motion in writing, alleging in substance that he is the father and one of the heirs-at-law of the said Julia Clarke, deceased, and as such is interested in said estate, and is aggrieved by the decree of this court dated the 3rd day of July, A. D. 1897, declaring Nancy B. Clarke, of said city of Columbia, South Carolina, to be the sole heir and distributee of the estate of the said Julia Clarke, deceased, and

Whereas, he therefore moves an appeal from the said decree of this court to the superior court of this State, to be holden in and for the county of Fairfield, State of Connecticut, on the first Tuesday of September, A. D. 1897, and offers to give a sufficient bond of prosecution as by said motion on file more fully appears.

This court finds that the said Henry P. Clarke is the father of said deceased, and as such is interested in said estate in such manner that his rights were and are affected by said decree, and therefore allows the said appeal.

And the said Henry P. Clarke lodged in court his bond to the State of Connecticut, in the sum of one hundred dollars, with Wm. D. Bishop, Jr., of Bridgeport, in said county of Fairfield, as surety, conditioned that the said Henry P. Clarke shall prosecute his appeal to effect, and answer all damages in case he fail to make his said appeal and plea therein good, and this court approves and accepts said bond, and orders that it be recorded and lodged on file.

Attest: CHARLES H. PECK,
Acting Judge.

23 At a court of probate holden at Bridgeport, in and for the district of Bridgeport, on the 24th day of July, A. D. 1897.

Estate of JULIA CLARKE, Late of Columbia, S. C., but Leaving Estate in said District, Deceased.

Whereas Henry P. Clarke, of said Columbia, the father of said deceased, has moved an appeal to the superior court, to be holden in and for the county of Fairfield, State of Connecticut, on the first Tuesday of September, 1897, from the decree of this court made on the 3rd day of July, A. D. 1897, declaring Nancy B. Clarke to be the sole heir and distributee of the estate of said deceased, which appeal has been allowed:

Therefore, pursuant to the statute in such case provided:

Ordered, that notice of said appeal be given to all persons interested therein, viz., by some proper officer, by leaving with Henry P. Clarke, administrator on said estate, and with John H. Perry, guardian *ad litem* of Nancy B. Clarke, or at his usual place of abode, or by mailing in a registered letter addressed to Henry P. Clarke,

administrator, Columbia, South Carolina, a true and attested copy of the original motion and order, allowing said appeal, at least 12 days before the session of said court to which said appeal is taken, and return made to the court.

Attest: CHARLES H. PECK,
Acting Judge.

STATE OF CONNECTICUT, }
County of Fairfield, } *ss:*

BRIDGEPORT, *August 12th*, 1897.

Then and there and by virtue hereof, I made service of the within and foregoing original appeal, motion and order, by depositing in the post-office at Bridgeport, Connecticut, postage paid by registered letter, addressed to Henry P. Clarke, administrator, Columbia, South Carolina, a true and attested copy hereof, and afterwards on the same day, in the town of Fairfield, I left a like true and attested copy hereof at the usual place of abode of John H. Perry, in said town of Fairfield, Connecticut.

Attest: PETER DOOLAN, JR.,
Deputy Sheriff for Fairfield County.

24 *Fees.*

Travel	$3 00
1 copy	1 00
2 services	24
3 endorsements	24
Postage	12
	$4 60

STATE OF CONNECTICUT, }
County of Fairfield, } *ss:*

BRIDGEPORT.

I, Patrick Phelan, clerk of the court of probate within and for the district of Bridgeport, in said county of Fairfield, and keeper of the records and seal thereof, hereby certify that I have examined the within and foregoing copy of the original motion of appeal and orders of said court thereon, *in re* estate of Julia Clarke, late of the city of Columbia, State of South Carolina, and have compared all of the foregoing with the original thereof now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, on this 27th day of August, A. D. 1897.

[SEAL.] PATRICK PHELAN, *Clerk.*

STATE OF CONNECTICUT, }
County of Fairfield, } *ss:*

BRIDGEPORT.

I, Albert M. Tallmadge, sole and presiding judge of the court of probate, within and for the district of Bridgeport, in said county of Fairfield, hereby certify that Patrick Phelan, whose name is above

written and subscribed, is, and was at the date thereof, clerk of the court of probate, within and for the district of Bridgeport, in said Fairfield county, and keeper of the records and seal thereof, duly commissioned and sworn, that I am well acquainted with his signature, and know the above to be his, and that the above certificate by him made is in due form to authenticate the records, files and proceedings of said court.

In testimony whereof, I have hereunto set my hand this 27th day of August, A. D. 1897.

ALBERT M. TALLMADGE, *Judge.*

25 STATE OF CONNECTICUT, } ss:
County of Fairfield, }

BRIDGEPORT.

I, Patrick Phelan, clerk of the court of probate, within and for the district of Bridgeport, in said county of Fairfield, hereby certify that Albert M. Tallmadge, whose name is within written and subscribed, is, and was at the date thereof, sole and presiding judge of the court of probate, within and for the district of Bridgeport, in said Fairfield county, duly commissioned and sworn; that I am well acquainted with his signature, and know the above to be his.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, on this 27th day of August, A. D. 1897.

[SEAL.] PATRICK PHELAN, *Clerk.*

HENRY P. CLARKE'S APPEAL FROM PROBATE.

Order of Notice.

STATE OF CONNECTICUT, } ss:
Fairfield County, }

BRIDGEPORT, *Oct.* 4, *A. D.* 1897.

Upon the appeal of the said Henry P. Clarke from the order and decree of the court of probate, for the district of Bridgeport, now pending in the superior court in and for Fairfield county.

It appearing to and being found by the subscribing authority, that Nancy Barnum Clarke, appellee in the above-entitled case, is absent from this State, residing in Columbia, State of South Carolina.

Therefore ordered, that notice of the pendency of said appeal be given by leaving a copy of said appeal and this order of notice with the said Nancy Barnum Clarke, on or before the 11th day of October, A. D. 1897, by some proper officer or indifferent person.

WM. R. SHELTON,
Clerk of the Superior Court for Fairfield County.

26 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Proof of Service of Appeal and Order on Nancy Barnum Clarke.

Personally appears before me, Thomas D. Green, and made oath that on the eighth day of October, 1897, he served Nancy Barnum

Clarke with a copy of Henry P. Clarke's appeal from the order and decree of the court of probate for the district of Bridgeport, now pending in the superior court in and for Fairfield county, State of Connecticut, by leaving with her a copy of said appeal at Asheville, N. C., where she temporarily resides with her father, the said Henry P. Clarke, and that he also left with her a copy of the notice of the pendency of said appeal on or before the 11th day of October, 1897, and deponent says that he is not related to either Henry P. Clarke or Nancy Barnum Clarke and has no interest in said appeal.

Sworn to before me Oct. 8th, 1897.

F. C. H. DUKES,
Notary Public.

[NOTARIAL SEAL.]

(Filed Oct. 28, 1897.
WM. R. SHELTON, *Clerk.*)

HENRY P. CLARKE'S APPEAL FROM PROBATE.

Superior Court, Fairfield County, October 12, 1897.

Order of Court Appointing Guardian ad Litem.

It appearing to the court that Nancy B. Clarke, appellee in the above-entitled action, is an infant of the age of nine years and that she has been duly personally served with the appeal and order of notice in the above-entitled action, and an application having been duly made to the court for the appointment of a guardian *ad litem* to appear and defend said action on her behalf; and it appearing to the court that John H. Perry, Esq., is a fit and proper person to act as such guardian *ad litem*, it is hereby

Ordered, that the said John H. Perry be and he is hereby appointed such guardian *ad litem* and is authorized and directed to appear and defend said action in her behalf.

By the court:

WM. R. SHELTON, *Clerk.*

27 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Superior Court, Fairfield *Court*, October 12, 1897.

Reasons of Appeal.

For reasons of appeal in the above-named proceeding, the appellant assigns the following:

I.

1. The estate of the intestate in the State of Connecticut consisted of property all of which is for purposes of distribution, and for the purpose of the ascertainment of heirs and distributees, personal estate.

2. The intestate was, at the time of her death, domiciled in the State of South Carolina and her estate has ever since the first day

of February, 1897, been in due process of settlement in the proper courts of that State.

3. By the laws of South Carolina, the appellant was and is entitled to a distributive share in all the personal estate of the intestate.

II.

1. The court erred in assuming to ascertain the heirs and distributees of the intestate, as all of the estate of the intestate for the purpose of the hearing then before the court consisted of personal property, and the courts of South Carolina alone had jurisdiction to fix and ascertain the heirs and distributees.

III.

1. The court erred in not dismissing the petition for want of jurisdiction to grant the relief prayed for in the application.

By STODDARD & BISHOP, *Attorneys.*

(Filed Oct. 12, 1896.
WM. R. SHELTON, *Clerk.*)

28 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Superior Court, Fairfield County, October 12, 1897.

Reply to Reasons of Appeal.

Paragraph one of the first reason of appeal is denied.
Paragraph two and three are admitted.
The second and third reasons of appeal are denied.

NANCY B. CLARKE,
By her guardian *ad litem*, JOHN H. PERRY.

(Filed Oct. 12, 1897.
WM. R. SHELTON, *Clerk.*)

HENRY P. CLARKE'S APPEAL FROM PROBATE.

Superior Court, Fairfield County, October 12, 1897.

Finding of Facts and Reservation.

Finding.

1. Henry P. Clarke, the appellant, while domiciled in the State of South Carolina, intermarried with Julia Hurd, in the State of New York, in the year 1886, and the married couple immediately returned to the State of South Carolina, which then became their domicile of marriage.

2. In 1889, a daughter, Nancy B. Clarke, was born, who still survives, and is the appellee herein.

3. In December, 1893, another daughter, Julia Clarke, the distribution of whose estate is now in question, was born. There were no other children born of said marriage.

4. On February 10, 1894, the wife, Julia H. Clarke, died.

5. On May 20, 1894, the daughter, Julia Clarke, died, leaving no creditors.

6. At all times after said marriage the State of South Carolina has been the domicile of the appellant and his family.

7. During coverture and at the day of the dates thereof the said Julia H. Clarke made and executed the will and codicil hereunto annexed and marked Exhibits A and B respectively.

29 8. Said will and codicil were duly established in the court of probate for Richland county in the State of South Carolina, and copies thereof have become part of the files and records of the probate court for the district of Bridgeport, pursuant to the provisions of sec. 550 Gen'l Statutes.

9. The daughter, Julia Clarke, owned no property in Connecticut at the time of her decease except such as had or should come to her under her mother's aforesaid will.

10. The property of the mother, Julia H. Clarke, possessed by her at the time of her decease consisted of $825.25 in personalty, the home plantation in South Carolina valued at $20,000, and real estate in Bridgeport, in this State, valued at $138,000, which last-mentioned property was distributed to her the day before her death in a partial distribution of the estate of her grandfather, P. T. Barnum, who died April 7, 1891, leaving a will under which she took a legacy of $100,000, (paid before said partial distribution) and one-sixth of the residue of his estate.

11. The estate of the daughter, Julia Clarke, referred to in the petition to the court of probate, consisted of an undivided one-third interest in the real estate so as above distributed to her mother. The value of the said Julia H. Clarke's entire interest in the estate of her grandfather was several hundred thousand dollars.

12. Both real estate and personal property of large value remained in the said Barnum residue at the death of the mother, Julia H. Clarke, for future distribution. The real estate so remaining is situated in Connecticut, New York and Kansas.

13. Henry F. Clarke (the appellant herein) "as executor of the last will and testament of Julia H. Clarke and trustee of the estate of Nancy B. Clarke, his infant daughter, under said will" brought suit against Nancy B. Clarke (the appellee herein) in the circuit court for the fifth judicial circuit of South Carolina, praying for the "judgment and direction of the court in regard to the true construction of said will and especially the fifth and residuary paragraph thereof, and as to his powers and duties as such executor and trustee under said will in the premises and for such further relief as may be just and proper."

A guardian *ad litem* was appointed for the infant defendant, who duly answered, and, after hearing had, the court "ordered, adjudged and decreed that the will of the testatrix, Julia H. Clarke,

30 worked an equitable conversion into personalty at the time of her death of all her real estate of whatsoever description and wheresoever situated, and that the plaintiff as executor, receive, administer and account for the same as personalty, and that he is

by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree."

14. This judgment was upon appeal subsequently affirmed by the court of last resort in South Carolina, as will appear by reference to the report thereof in 46 So. Car., 230, which is hereby made a part hereof, and said decision was considered by the probate court from which the appeal is taken.

15. By the law of the State of South Carolina, the court to which the action was brought, mentioned in paragraph 13 hereof, had jurisdiction both of the persons and of the subject-matter of that suit, and by a like law the appellant shared equally with his surviving child in the distribution of the estate of the deceased.

16. The intestate was at the time of her death domiciled in the State of South Carolina and her estate has, ever since the first day of February, 1897, been in due process of settlement in the proper courts of that State.

17. Nancy B. Clarke has had actual notice of the pendency of this appeal, and John H. Perry, Esq., has been duly appointed by this court her guardian *ad litem*.

Exhibit A.

I, Julia H. Clarke, wife of Henry P. Clarke, residing near Eastover, in Richland county, State of South Carolina, being of sound and disposing mind and memory, do make and ordain this my last will and testament and hereby revoke all other wills by me at any time heretofore made.

First: I direct that all my just debts and my funeral expenses shall be fully paid by my executor hereinafter named.

Second: I direct that a portion of my estate sufficient to produce one thousand dollars ($1,000) annually, shall be safely invested by my executor and the said one thousand dollars be paid annually to my father, S. H. Hurd, now of New York city, in quarterly payments, during the term of his natural life.

31 Third: I give and bequeath to Mrs. Laura Sherwood, of Bridgeport, Connecticut, the sum of ten thousand dollars, ($10,000).

Fourth: I give and bequeath to Miss Agnes C. Patterson, of said Bridgeport, the sum of five thousand ($5,000) dollars.

Fifth: The rest, residue and remainder of my estate, real and personal, of whatever description or wheresoever situated, I give, devise and beq-eath as follows: One-half thereof to my husband, Henry P. Clarke, and one-half thereof to my said husband in trust for my daughter, Nancy, until she becomes twenty-five years of age, and then to pay the whole sum over to her. But if she shall marry before that age with the consent and approval of her father, or in case of his death, with the consent and approval of her then guardian, then I direct that one-half of her share shall be paid to her upon her marriage and the other half when she becomes twenty-five.

In case I shall leave surviving me one or more children beside my daughter Nancy, then I direct that the said rest, residue and remainder of my estate shall be divided equally among my said husband and all of my children, share and share alike, my husband and my children sharing *per capita*, and the shares of said children to be held in trust as above provided in the case of Nancy as being the only one.

And I give, devise and bequeath the said rest, residue and remainder as aforesaid, to each and to their heirs and each of them forever.

I constitute and appoint my said husband, Henry P. Clarke, to be executor and trustee of this my will and direct that no bonds be required of him under either appointment.

In witness whereof, I have hereunto set my hand and seal at Bridgeport, Connecticut, this twenty-fifth (25th) day of May, A. D. 1891.

JULIA H. CLARKE. [SEAL.]

Signed, sealed, published and declared as and for her last will and testament by the said Julia H. Clarke in our presence, who in her presence and at her request, and in the presence of each other, have signed our names as witnesses thereto.

WILLIAM H. COMLEY, Bridgeport, Conn.
JOSEPH J. ROSE, " "
GEORGE P. CARROLL, " "

32 STATE OF CONNECTICUT, } ss.:
County of Fairfield, }

BRIDGEPORT, *May* 26, 1891.

Personally appeared before me, William H. Comley, Joseph J. Rose and George P. Carroll, who, each being duly sworn by me, deposes and says, that they were present and saw Julia H. Clarke sign the foregoing will and heard her declare the same to be her last will and testament. That she signed said will in the presence of all of said witnesses and they each subscribed said will as witnesses in her presence, in the presence of each other, and at her request, and that at the time of signing said will she appeared to be of lawful age, and they and each of them believe her to have been of sound mind and memory, and they make this affidavit at her request.

WILLIAM H. COMLEY.
JOSEPH J. ROSE.
GEORGE P. CARROLL.

Subscribed and sworn to before me this 26th day of May, A. D. 1891.

[SEAL.] CHARLES SHERWOOD,
Notary Public, State of Connecticut.

EXHIBIT B.

State OF COLUMBIA, }
County of Richland. }

I, Mrs. Julia H. Clarke, wife of Henry P. Clarke, formerly residing near Eastover, in the county and State aforesaid, but now residing in the city of Columbia, of said county and State, having made my last will and testament bearing date the 25th day of May, A. D. 1891, at Bridgeport, in the State of Connecticut, do now make this codicil to be taken as a part of the same;

First: I hereby ratify and confirm my said will in every respect save as far as any part of it is inconsistent with this codicil.

Second, I hereby revoke the third *item* of said will, and in lieu thereof I will and direct that a portion of my estate sufficient to produce five hundred dollars annually, shall be safely invested by my executor, and the said five hundred be paid annually in quarterly payments to Mrs. Laura Sherwood, of Bridgeport, Conn., during the term of her natural life.

Three: I further will and direct that after the death of said Mrs. Laura Sherwood that the portion of my estate which shall at that time be invested for her benefit under the second item of this
33 codicil, shall then become a portion of my estate, and is hereby disposed of as directed in item five of my said will; and I further direct that if said Mrs. Laura Sherwood shall die before my death then the investment directed for her benefit under item two of this codicil, shall be and is hereby disposed of as directed in item five of my said will.

Four: I further will and direct that after the death of my said father, S. H. Hurd, that the portion of my estate which shall at that time be invested for his benefit as directed in item two of said will, shall then become a portion of my estate and shall be disposed of as directed in item five of my said will; and I further direct that if my said father shall die before my death then the investment directed for his benefit in said item two shall be disposed of as directed in item five of my said will.

In witness whereof I, the said Julia H. Clarke, have hereunto subscribed my name and set my seal to the foregoing codicil of four items, at Columbia, in the said State, this the 11th day of November, A. D. 1893.

JULIA H. CLARKE. [L. S.]

Signed, sealed, published and declared by the said Julia H. Clarke, the testatrix, as and for her codicil to her last will and testament in the presence of us, who at her request, in her presence and in the presence of each other, have hereunto subscribed our names as witnesses.

ELEANOR R. BENNETT.
JOHN S. VERNER.
F. H. WESTON.

HENRY P. CLARKE'S APPEAL FROM PROBATE.

Fairfield County Superior Court, October 12, 1897.

Reservation.

The court finds the facts in the above-entitled case to be as set forth in the above finding of facts, and with the consent of all the parties to said cause, all the questions of law which may arise or may be raised upon the record in said cause, and as to what advice shall be given and to whom, or what judgment should be rendered in said case, are hereby reserved for the consideration and advice of the supreme court of errors to be held at Bridgeport, within and for the third judicial district, on the fourth Tuesday of October, A. D. 1897.

ELMER, *Judge.*

(Filed Oct. 12, 1897.
WM. R. SHELTON, *Clerk.*)

34 Superior Court, Fairfield County.

CLERK'S OFFICE.

The above and foregoing is a true copy of record in said superior court.

Attest: WM. R. SHELTON, *Clerk.*

Supreme Court of Errors, Fairfield County.

CLERK'S OFFICE.

The above and foregoing is a true copy of record in said supreme court of errors.

Attest: WM. R. SHELTON, *Clerk.*

35 At a supreme court of errors, in the third judicial district, holden at Bridgeport on the fourth Tuesday of October, 1897.

HENRY P. CLARKE'S APPEAL FROM PROBATE.

On reservation by superior court No. 8.

This reservation, presenting questions of law which have arisen on the trial of a case pending in the trial court, as may appear by the certified transcript of record and finding of the trial judge in said case on file in this court, was made by the superior court for Fairfield county on the 12th day of October, 1897, and came to this court at its session at Bridgeport on the fourth Tuesday of October, 1897, when the parties appeared and were fully heard.

Whereupon it is considered and adjudged that the said superior court be, and is hereby, advised as follows: The superior court is advised to affirm the decree of the probate court.

By the court:

WM. R. SHELTON, *Clerk.*

36 HENRY P. CLARKE'S APPEAL FROM PROBATE.

(Argued November 2d, 1897; decided January 5th, 1898.)

BALDWIN, *J.*:

Julia Clarke, of South Carolina, died there in infancy, and at the time of her decease was the owner of real estate in Connecticut. Her interest in it was derived from the will of her mother, Julia H. Clarke, who was also a citizen of South Carolina. This will was admitted to probate in the proper court of that State and a suit for its construction afterwards brought there before a court of equity having jurisdiction of the parties and the subject-matter, which resulted in a decree to the effect that it worked an equitable conversion of all the real estate of the testatrix wherever situated.

If this be the true construction of the will the decree of the court of probate for the district of Bridgeport, from which the present appeal is taken, was erroneous.

The appellant contends that upon this point the South Carolina decree is conclusive, both on the ground that the matter thus became *res adjudicata* and because to hold otherwise would be to deny full faith and credit to the judgments of a sister State.

The only parties to that proceeding were Henry P. Clarke, as executor of the will of Julia H. Clarke and trustee of the estate of Nancy B. Clarke, his infant daughter, under the will, as plaintiff and Nancy B. Clarke as defendant.

37 The parties to the present proceeding are Henry P. Clarke as the sole appellant, and as appellees Henry P. Clarke, as administrator of the estate of Julia Clarke, deceased, by virtue of letters granted by the court of probate for the district of Bridgeport, Nancy B. Clarke, and John H. Perry, Esq., her guardian *ad litem* by appointment of that court.

It is obvious that the parties thus before us are not the same as the parties to the South Carolina action. There Henry P. Clarke did not appear in his own right, and no one was brought in as a representative of the estate of his deceased daughter, Julia. Here Henry P. Clarke does appear in his own right, and is also present as the proper representative of that estate, but has not been brought in as the executor of his wife's will or as a trustee under it for his daughter Nancy.

If the South Carolina decree had been that the terms of the will did not work a conversion, Henry P. Clarke in his own right would have been free to contest that decision in other proceedings, and so would the administrator of the estate of his daughter Julia. One who occupies a representative position is in that capacity a person totally distinct in the view of the law from himself individually. In an action by an administrator the plaintiff's admissions made before the grant of administration cannot be received. Rockwell *v.* Taylor, 41 Conn., 55. Had Mr. Clarke, before bringing his action in South Carolina, taken out administration there on his daughter's estate and then made himself in that capacity one of the defendants,

it is doubtful whether the judgment would have bound him, as administrator of her estate in Connecticut, when afterwards
38 entrusted with that position, under the laws of another sovereignty, by the court of probate for the district of Bridgeport. Story on the Conflict of Laws, sec. 522. Had a different person been appointed administrator in each State, it is certain that there would have been no privity between them. Stacy *v.* Thresher, 6 How., 44. Estoppels must be mutual. Nancy B. Clarke cannot be bound by the South Carolina decree unless Henry P. Clarke was bound by it, and Henry P. Clarke was bound by it only as executor and trustee under her mother's will; nor can Henry P. Clarke, as a Connecticut administrator, be bound by that decree, as a rule for distributing an estate which during the whole course of the suit in which the decree was rendered had no representative to protect its interests before the court.

A comparison of the South Carolina record with that in the case at bar shows also that the subject-matter of these actions is not the same.

The South Carolina court was called upon to construe the will of a citizen of South Carolina disposing of lands in that and other States. It had jurisdiction to make a final and conclusive disposition of the questions presented so far only as it had power to compel obedience to its decree or as its judgment derived an additional force from the Constitution and laws of the United States.

Courts sit to determine causes and to enforce their determination. It is a general rule that what they cannot enforce they cannot decree. So far as concerns the extraterritorial effect of foreign
39 judgments, this rule is a principle of international law, subject only to such exceptions as may be founded on the consent of parties or the exercise of judicial comity in the rare cases where no one country can accomplish the ends of justice by its own unaided authority. Dicey on the Conflict of Laws, 38–42.

The courts of South Carolina could settle the construction of Mrs. Clarke's will, so far as related to the real estate in that State, and to the whole of her personal estate; but this personal estate is that only which she owned at the time of her decease, together with any for which the executor might become accountable by a lawful conversion of realty into personalty. They could not reach out into other States and issue process to authorize the seizure there of lands to which she had a title. They could only exercise a restraining force upon the parties who were before the court, and only upon them in their relations to each other. Carpenter *v.* Strange, 141 U. S., 87, 105.

Bearing these principles in mind, it is not difficult to ascertain the subject-matter presented to their consideration and disposed of by the judgment which they rendered. It was a definition of what by the laws of South Carolina was the power, duty, and estate of the executor and trustee under the will as between him and Nancy B. Clarke. It was this and nothing more, because the plaintiff could submit to them nothing more.

Whether he had any power, duty, or estate with respect to lands

situated in another State depended upon the laws of that
40 State. Succession to the real estate of a deceased person is regulated at the will of the sover-ign within whose territory it is embraced. It has always been regarded as a matter of grave political consequence. Birtwhistle *v.* Vardill, 7 Clark & Finelly, 895. Ownership of land controls its occupancy and largely influences the character of the population. It determines the source to which governments ordinarily look for their surest, if not their principal, means of financial support. It had in former times, in England and in all her American colonies, an intimate relation to the right of suffrage, and in this State is still a qualification for it under at least one of our municipal charters. 9 Special Laws, 431.

The laws of Connecticut must decide how the lands of Connecticut may be conveyed and inherited, and they make particular provision, in case of intestacy, for the preservation of ancestral real estate in the line of family descent. General Statutes, sec. 632. Upon the death of a land-owner, whether a citizen of the State or not, whoever takes title by succession takes it because these laws concede it to him, not as a right, but as a privilege. It is on this basis that succession taxes are upheld. They constitute part of the terms upon which the grant of the State is conditioned. Mager *v.* Grima, 8 How., 490. A devisee takes by an artificial perpetuation of a testator's will, which survives him for that purpose with a vitality conferred and created by positive law. By that same law the form of its expression is prescribed and limited. Title to land can
41 be conveyed under a testamentary power only when such a conveyance is sufficient under the laws of the territorial sover-ign.

The personal representative of Mrs. Clarke rightfully sought the direction of the courts of her domicil as to the effect of her will upon the estate for which he was or might become accountable before them. As to that matter, the courts of Connecticut could not instruct him. Russell *v.* Hooker, 67 Conn., 24. This was the subject-matter of the South Carolina action, and the decree rendered is conclusive upon those who were parties to it. On the other hand, the subject-matter of the case before us is the ascertainment of those who by the laws of Connecticut are entitled to succeed to certain Connecticut lands which form part of an intestate estate in course of settlement before a Connecticut court of probate. As to this the courts of South Carolina could give no instructions and were asked for none. The whole decree must be taken together in determining its true scope and meaning. The adjudication that the will worked an equitable conversion of all the real estate of the testatrix wheresoever situated is immediately followed by the adjudication "that the plaintiff as executor receive, administer, and account for the same as personalty, and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree." It is not to be presumed that the court intended to go beyond its jurisdic-

tion. In directing the plaintiff as executor to receive, ad-
42 minister, and account for all his wife's real estate as per-
sonalty his duty as to the real estate in South Carolina and as to the proceeds of any sales that might be made under the terms of her will of real estate situated out of the State was plainly laid down. These were the instructions which he needed for his protection, and if, in fact, he hereafter receives under the letters testamentary issued to him by the probate court of South Carolina any moneys to be accounted for before that court from sales of real estate in other States they will regulate his disposition of them. The decree relates solely to his powers and functions as an executor and does not speak of those belonging to him as a trustee. The conversion was to be accomplished before any transfers were made to constitute the trust estate. The only subject of adjudication was the proper mode of administering upon the estate of Mrs. Clarke so far as it was or should be in course of settlement before the courts of probate of her own State. Those courts could only deal with the property that had come or might come under their control. McCartney *v.* Osburn, 118 Ill., 403.

The South Carolina decree, therefore, did not estop Nancy B. Clarke from urging in this action in support of her claims as heir of Julia Clarke under the Connecticut statute of distributions that the real estate to be distributed was held by her sister as real estate under their mother's will. Those questions had never before been litigated between her and Henry P. Clarke.

It is unnecessary to inquire whether if he had been a party individually to the South Carolina suit and the principal administrator of the estate of Julia Clarke had also been brought in
43 the court would have had jurisdiction to make a final and conclusive determination as to the effect of the will upon lands in other States and their descent upon the decease of those in whose favor the testatrix disposed of them. Under the conditions which in fact existed its determination did not constitute a binding rule of decision for the court of probate for the district of Bridgeport in the present proceeding, either under the principles of general jurisprudence or the Constitution and laws of the United States. Aspden *v.* Nixon, 4 How., 467, 497.

The decree of that court, from which this appeal is taken, treated the real estate in this State left by Julia Clarke as being real estate to all intents and purposes. If in truth it had become before her death the subject of an equitable conversion, this decree must be reversed, and the reasons of appeal have brought this point directly before the superior court for decision.

Equitable conversion results from the existence of a power to convert realty into personalty or personalty into realty, which has not been exercised. There must be both the grant of a power and the imposition of a duty to make use of it.

The will and codicil of Mrs. Clarke directed her executors to pay her debts; to invest a portion of her estate, sufficient to produce an annuity of $1,000, to be paid to her father during his life; to make a similar investment of enough to yield an annuity of $500, to be

paid to another, and to pay a certain legacy of $5,000. As to the residue of her estate, real and personal, wherever situated, she
44 provided that it should "be divided equally among my said husband and all of my children, share and share alike, my husband and my children sharing *per capita*, and the shares of said children to be held in trust." The husband was made the devisee and legatee of the children's shares in trust for each until the child should become twenty-five years of age, upon which event he was "to pay the whole sum over to" such child, and should the latter previously marry with his approval or, in case of his death, with that of a proper guardian, half of the "share" of such child was to "be paid" to him upon his marriage and "the other half" when he became twenty-five. These provisions were followed by a devise and bequest of the residuary estate "as aforesaid to each and to their heirs and each of them forever."

The personal estate in possession of the testatrix at the time of her decease was inventoried at only $825, but she was also entitled to a residuary interest worth over one hundred thousand dollars in a large estate consisting of both realty and personalty, in course of settlement in this State. It was, therefore, uncertain whether it would be necessary to sell any of her real estate to meet debts and legacies, and we concur with the supreme court of South Carolina in the opinion that there was nothing in the will to work the out and out conversion for which the appellant contends, unless that be the result of the dispositions of the residuary clause. Clarke *v.* Clarke, 46 S. Car., 230, 243.

It was the view of that court that this result did follow from the commingling of the entire residuary estate, both real and
45 personal, in one common mass, and the directions to divide it into equal parts, one to belong to the husband and one to him in trust for each child, and that he "pay over the whole sum" of each daughter's share to her when she becomes twenty-five, or in case of her marrying sooner, with the consent of her father or guardian, that "one-half of her share shall be paid to her upon her marriage and the other half when she becomes twenty-five." We have considered the grounds for this conclusion set forth in the learned opinion of Mr. Justice Pope, with the care demanded by our respect for the distinguished tribunal for which he sp[illegible] and find ourselves unable to yield assent to the train of reason[illegible], so far as it may apply to the effect of the will upon the real estate in Connecticut.

In every case in which a testator owning both real and personal estate, after making particular provisions for debts and legacies, disposes of all the residue of his estate in favor of one or more persons, this residue may be said to be thus commingled or blended in one common mass. He gives it as an entirety, and, unless he otherwise directs, it is given in the precise condition in which it exists, whether real or personal. Mrs. Clarke used apt terms to convey real estate. The phrase "I give, devise, and bequeath" is used in the beginning of the residuary clause and repeated at its close, with the addition of words of limitation descriptive of a fee-

simple estate in lands, and unnecessary for any other purpose. The direction for an equal division between her husband and children is naturally applicable to a division of the property left rather
46 than of its proceeds. The only provisions, indeed, which are particularly relied on in support of the appellant's claims are those as to paying over the whole sum belonging to each child's share upon her attaining the age of twenty-five, and in the event of her marriage under certain conditions half of her share at an earlier period.

It is unquestionable that these terms are appropriate only to a payment of money, but they must be read in connection with the rest of the will. No payment was directed until the beneficiary married or attained the age of twenty-five, and it was then to be made by the trustee, not by the executor. If a conversion of realty into personalty were requisite in order to raise the sums so payable, it could not be requisite until one of those events was in immediate prospect. To turn either real or personal property into money at an earlier time and keep it on hand as money, uninvested, would be of no benefit to the *cestui que trust*. No power of sale to be implied under the circumstances of the case could be exercised by the executor before the estate passed into the hands of the trustee. As the executor was not to make the payments in question, they could furnish no occasion for him to make a conversion, and unless the testatrix cast either upon him or upon the trustee a power and duty of immediate conversion, the decree of the court of probate was correct.

The doctrine of equitable conversion is simply an application of the fundamental principle that equity regards that as done which ought to be done. Unless a sale of the Connecticut real estate ought to have been made as soon as practicable after the decease of
47 the testatrix, it is not to be regarded as having the character of personal estate. If a sale ought to have been made, it is because a power to sell is implied from the terms of the residuary clause and is necessary to give that clause its due effect. The heirs-at-law of Julia Clarke are not to be excluded from the inheritance by anything short of a clear implication from the provisions of the will under which her estate was derived. We are unable to find any implication of a power to make such a sale in favor of Mr. Clarke, either as executor or as trustee. The dominant and controlling words in the fifth article of the will are those by which the testatrix gives, devises, and bequeaths her residuary estate, "real and personal, of whatsoever description and wherever situated," to her husband and children, to be divided equally between them *per capita*, "to each and to their heirs and each of them forever." The provisions for a temporary trust in respect to the share of each child are subsidiary. They are for the sole benefit of the children, and it is highly improbable that they were intended to curtail the beneficial estate absolutely given to their father by requiring that it should be turned into money, either before he received it or as soon as he received it. It is much more natural to suppose that the

word "pay" was used for "transfer," and "sum" as the equivalent of what in the same sentence is described as a "share."

It is suggested that Mrs. Clarke must have known that her real estate was scattered through four States and that the laws of some of these States as to the distribution of intestate estates differed widely from that of South Carolina, and therefore is to be presumed to have intended to provide for the event of the decease of one of her children during minority, by directing such a sale as would make their shares at once subject to the laws of her domicil. The appellant also contends that an obvious motive for directing such a conversion was securing the higher rate of income which would probably be derived from investments made in her own State, as well as the greater safety from having them more immediately under the eye of the trustee. It is evident that both the will and codicil were prepared by counsel familiar with the ordinary terms of testamentary disposition. The codicil was executed at her own home, and the utmost solicitude was evinced in it to protect the interests of those who were to receive her residuary estate, by stating explicitly what the law would have sufficiently implied, that they should ultimately receive the funds set apart for the benefit of the two annuitants. Had it been the desire of Mrs. Clarke that her decease should be followed by an immediate sale of all her lands, her counsel could have found no difficulty in expressing this with equal distinctness.

48

The claim is made, and is not wholly without countenance in reported cases, that an intent to convert may be implied, in the absence of any positive direction to sell or of any absolute necessity to sell, if the will so blends together real and personal estate as clearly to show that the testator meant to create a common fund out of both, and to bequeath it as money. Hunt's and Lehman's Appeal, 105 Pa. St., 128, 141. No general residuary devise and bequest can be given such an effect as respects lands in Connecticut, unless from the whole scheme of the will or the particular language employed a power of sale is clearly implied. Conversion is effected by sale. Equitable conversion is effected by a power to sell and a duty to sell. It is not enough to manifest an intent that lands shall pass as money unless there is also, either in terms or by implication, a grant of the means of turning it into money. Hobson *v.* Hale, 95 N. Y., 588; Hale *v.* Hale, 125 Ill., 399; 17 Northeastern Reporter, 470.

49

If the question were one not directly involving the mode of passing title to lands in this State, the rules of international comity might require us to accept the interpretation of the will established in the courts of South Carolina. Rockwell *v.* Bradshaw, 67 Conn., 8, 14. Such would be the case, for instance, if the point in controversy were whether a certain devise of land in this State, which was inoperative under our laws for want of some statutory formality, if accompanied by a legacy to the heir-at-law, might not impose upon him the personal obligation of electing whether to take the bequest and give effect to the devise by a voluntary conveyance or keep his land and lose his legacy. Trotter *v.* Trotter, 4 Bli, N. S., 502.

Similar considerations might apply to the construction of a legacy to a wife in respect to whether it was in lieu of dower or not. Washburn *v.* Van Steenwyck, 32 Minn., 336; Van Steenwyck *v.* Washburn, 59 Wis., 483; Lee *v.* Tower, 124 N. Y.,
50 370. So, if the power claimed were one of appointment, that it affected lands in this State would not deprive the court of the domicil of its right to interpret authoritatively the meaning of the terms employed in the will, which, though drawn in Connecticut, was by the codicil republished in South Carolina; but the power which that court has found to be implied from the language of the testatrix is one of sale. An appointment under a power of appointment as to lands passes the title to them by virtue of the will, which is itself the conveyance and the only one. A power of sale, on the other hand, imports only a power to convey by an independent conveyance drawn and executed with all the formalities and subject to all the conditions incident to ordinary deeds. That the will is duly executed for the disposition of real estate is sufficient to support the exercise of a testamentary power of appointment in the manner directed by the testator; but it is not sufficient to dispense with a deed of the ordinary form where the power is one to sell and convey. The question, then, is no longer simply what wishes the testator has expressed, but whether he has so expressed them as to enable acts to be performed after his decease by his authority which will avail to effectuate these wishes according to the requirements of local law. If the will in question worked a conversion, it is because the executor or the trustee could under its provisions have executed a deed sufficient under the laws of Connecticut to transfer title to real estate. Whether this could
51 have been done or not is necessarily a matter to be decided according to those laws as they may be interpreted by the judiciary of Connecticut. White *v.* Howard, 46 *N.* Y., 144, 159; Wharton on the Conflict of Laws, sec. 597; Page's Estate, 75 Pa. St., 87.

The case of Ford *v.* Ford, 80 Mich., 42, in which the construction given to a Wisconsin will by a Wisconsin court (Ford *v.* Ford, 70 Wis., 19; 72 Wis., 621) as to its working an equitable conversion of the real estate of the testator situated in Michigan was followed, stands upon two grounds: That the decision of the court of the testator's domicil was conclusive, and that it was correct. The latter was, of course, sufficient to support the judgment. Considerable reliance seems also to have been placed on the provision of the code of Michigan that upon probate there of a foreign will affecting property in Michigan it should be disposed of according to the will "so far as said will may operate upon it." Similar weight was properly accorded in Guerard *v.* Guerard, 73 Ga., 506, 509, to a section of the Georgia code making the law of the place where any writing is executed controlling as to its effect. In Crusoe *v.* Butler, 36 Miss., 150, the deed of an executor under a power conferred by an Alabama will was held to pass title to lands in Mississippi, the power having been executed in a manner which the courts of Alabama had adjudged to be sufficient, although not in accordance

with the law of Mississippi. Here, however, the Alabama decision had been rendered in a suit between the same parties or those with whom they were in privity, and that in Mississippi was plainly justified by the doctrine of *res adjudicata*.

52 One of the claims set up in behalf of Nancy B. Clarke remains to be noticed. It is that under the statute of uses no effectual trust in the lands in question was created, since no active duties were imposed upon the trustee.

This position is untenable. The terms of the devise and bequest of his daughter's shares to Mr. Clarke in trust invested him with the legal title, and sufficiently implied a right to hold and manage these estates until the events should occur upon which they were to be turned over to their own control. So far as respects the share of Julia Clarke, her death in infancy has rendered the occurrence of these events impossible; but that Mr. Clarke has now become as to that the holder of a simple naked trust does not affect the fact that his trust was originally an active one. The legal estate devolving upon him and the beneficial estate given to his daughter were vested in each upon the decease of the testatrix. Upon the death of Julia Clarke her interest in any lands in this State under her mother's will passed to her sole heir-at-law, in whose favor the decree appealed from was made.

The superior court is advised to affirm the decree of the court of probate.

In this opinion the other judges concurred.

53 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Appellant's Appeal.

Supreme Court of Errors, Third Judicial District, April Term, 1898.

Estate of JULIA CLARKE, Late of Columbia, South Carolina, but Leaving Real Estate in this District, Deceased.

To the honorable probate court for the district of Bridgeport:

The petition of the subscriber respectfully showeth:

1st. That the deceased, whose estate is now in course of settlement in this district, died intestate and possessed of real estate in this district, as appears more fully by the inventory filed May 28, 1897.

2nd. That divers persons claim to be entitled to have the said real estate set out and distributed to them.

Wherefore, your petitioner makes request that the court hears their claims and ascertain to whom this estate shall be set out and distributed.

(Signed) HENRY P. CLARKE,
Administrator,
By STODDARD & BISHOP,
His Attorneys.

Dated at Bridgeport, this 29th day of May, 1897.

DISTRICT OF BRIDGEPORT, } ss:
Probate Court, }

Estate of JULIA CLARKE, Late of the City of Columbia, South C
lina, Deceased, but Leaving Real Estate in the City of Bridge
in said District.

MAY 29, 189

54 Upon the application of Henry P. Clarke, administ
on said estate as per application on file more fully app
it is—

Ordered, that said application be heard and determined a
probate office, in Bridgeport, in said district, on the 14th da
June, A. D. 1897, at 11 o'clock in the forenoon, and that notic
given of the pendency of said application and the time and p
of hearing thereon, by sending by mail, postage paid, a copy of
application and of this order to the parties in interest on or be
June 1st, 1897, and return make to this court.

ALBERT M. TALLMADGE, *Judg*

Order of Probate Court Ascertaining Heir and Distributee.

At a court of probate holden at Bridgeport, within and for
district of Bridgeport, on the third day of July, 1897.

In the Matter of the Application of HENRY P. CLARKE, Adm
trator of the Intestate Estate of JULIA CLARKE, Praying
Court to Ascertain the Heirs and Distributees of said Estate.

The application aforesaid came to this court on the 29th da
May, 1897, and notice of the hearing thereon was given by the
plicant, in all respects according to the order pertaining there
on file. This court further finds that Nancy B. Clarke, herein
named, received actual notice thereof.

At the time named in said order the applicant appeared.
court found that the deceased died at the age of about five mo
leaving her surviving a father, the said Henry P. Clarke, bu
mother, and a sister, Nancy B. Clarke, of Columbia, in the Sta
South Carolina, but no other brothers or sisters or issue of dece
brothers or sisters, and that the said Nancy B. Clarke is a m
about eight years of age.

Whereupon this court appointed John H. Perry, Esq., of Fair
in Fairfield county, guardian *ad litem* for the said Nancy B. Cl
as by said appointment on file will more fully appear. Said
ter came thence by continuance to the present time, when the
applicant and the said guardian *ad litem* appeared and were
heard thereon.

Upon such hearing, this court finds that the intestate was d
ciled in the State of South Carolina at the time of her decease;
the entire inventoried assets of her estate in this State consist
undivided interest in certain real estate, situated in the tow
Bridgeport, of the value of about $—, which said interest wa

rived from the will of her mother, Julia H. Clarke, who died
55 about four months prior to the decease of the intestate domiciled in the State of South Carolina, an exemplified copy of whose will "and the decision of the supreme court of South Carolina interpreting the same in a case in which the petitioner herein was plaintiff and Nancy B. Clarke was defendant," is on file and of record in this court and hereby referred to, and whose estate is as yet unsettled and undistributed.

Wherefore this court finds and decrees that the sole heir and distributee of the estate of the intestate is her aforesaid sister, Nancy B. Clarke.

ALBERT M. TALLMADGE, *Judge.*

HENRY P. CLARKE'S APPEAL FROM PROBATE.

Court of Probate, District of Bridgeport, July 21, 1897.

In re Estate JULIA CLARKE, Late of the City of Columbia, State of South Carolina, Deceased, but Leaving Estate in This District.

To the honorable court of probate in and for the district of Bridgeport, in the county of Fairfield, State of Connecticut, Greeting:

Henry P. Clarke, of the city of Columbia, State of South Carolina, respectfully represents:

1. That he is the father and only surviving parent of the said Julia Clarke, deceased.

2. That he is an heir-at-law and distributee of the estate of the said Julia Clarke, deceased.

3. That he is aggrieved by the order and decree of this court, made on the 3rd day of July, A. D. 1897, as by said decree on file more fully appears, declaring one, Nancy B. Clarke, of said city of Columbia, to be the sole heir and distributee of the estate of the said Julia Clarke, deceased.

The said Henry P. Clarke therefore moves an appeal from the said decree of this court of probate to the superior court, to be holden in and for the county of Fairfield, and State of Connecticut (in which county said court of probate was held) on the first Tues-
day of September, A. D. 1897, and he offers and files a suffi-
56 cient bond with surety to the State of Connecticut, to prosecute said appeal to effect and answer all damages in case he fail to make his said appeal and plea therein good.

Dated at Bridgeport this 21st day of July, 1897.

HENRY P. CLARKE,
By STODDARD & BISHOP,
His Attorneys.

At a court of probate held at Bridgeport, in and for the district of Bridgeport, on the 24th day of July, A. D. 1897.

Estate of JULIA CLARKE, Late of Columbia, South Carolina, Deceased.

Whereas, Henry P. Clarke, of said Columbia, appeared in court and filed his motion in writing, alleging in substance, that he is the

father and one of the heirs-at-law of the said Julia Clarke, deceased, and as such is interested in said estate, and is aggrieved by the decree of this court dated the 3rd day of July, A. D. 1897, declaring Nancy B. Clarke, of said city of Columbia, South Carolina, to be the sole heir and distributee of the estate of the said Julia Clarke, deceased, and

Whereas, he therefore moves an appeal from the said decree of this court to the superior court of this State, to be holden in and for the county of Fairfield, State of Connecticut, on the first Tuesday of September, A. D. 1897, and offers to give a sufficient bond of prosecution as by said motion on file more fully appears.

This court finds that the said Henry P. Clarke is the father of said deceased, and as such is interested in said estate in such manner that his rights were and are affected by said decree, and therefore allows the said appeal.

And the said Henry P. Clarke lodged in court his bond to the State of Connecticut, in the sum of one hundred dollars, with Wm. D. Bishop, Jr., of Bridgeport, in said county of Fairfield, as surety, conditioned that the said Henry P. Clarke shall prosecute his appeal to effect, and answer all damages in case he fail to make his said appeal and plea therein good, and this court approves and accepts said bond, and orders that it be recorded and lodged on file.

Attest: CHARLES H. PECK,
Acting Judge.

57 At a court of probate holden at Bridgeport, in and for the district of Bridgeport, on the 24th day of July, A. D. 1897.

Estate of JULIA CLARKE, Late of Columbia, S. C., but Leaving Estate in said District, Deceased.

Whereas Henry P. Clarke, of said Columbia, the father of said deceased, has moved an appeal to the superior court, to be holden in and for the county of Fairfield, State of Connecticut, on the first Tuesday of September, 1897, from the decree of this court made on the 3d day of July, A. D. 1897, declaring Nancy B. Clarke to be the sole heir and distributee of the estate of said deceased, which appeal has been allowed:

Therefore, pursuant to the statute in such case provided:

Ordered, that notice of said appeal be given to all persons interested therein, viz., by some proper officer, by leaving with Henry P. Clarke, administrator on said estate, and with John H. Perry, guardian *ad litem* of Nancy B. Clarke, or at his usual place of abode, or by mailing in a registered letter addressed to said Henry P. Clarke, administrator, Columbia, South Carolina, a true and attested copy of the original motion and order, allowing said appeal, at least 12 days before the session of said court to which said appeal is taken, and return made to the court.

Attest: CHARLES H. PECK,
Acting Judge.

STATE OF CONNECTICUT, }
County of Fairfield, } ss:

BRIDGEPORT, *August 12th*, 1897.

Then and there and by virtue hereof, I made service of the within and foregoing original appeal, motion and order, by depositing in the post-office at Bridgeport, Connecticut, postage paid by registered letter, addressed to Henry P. Clarke, administrator, Columbia, South Carolina, a true and attested copy hereof, and afterwards on the same day, in the town of Fairfield, I left a like true and attested copy hereof at the usual place of abode of John H. Perry, in said town of Fairfield, Connecticut.

Attest:

PETER DOOLAN, JR.,
Deputy Sheriff for Fairfield County.

58 *Fees.*

Travel	$1 00
1 copy	1 00
2 services	24
3 endorsements	24
Postage	12
	$4 60

STATE OF CONNECTICUT, }
County of Fairfield, } ss:

BRIDGEPORT.

I, Patrick Phelan, clerk of the court of probate within and for the district of Bridgeport, in said county of Fairfield, and keeper of the records and seal thereof, hereby certify that I have examined the within and foregoing copy of the original motion of appeal and orders of said court thereon, *in re* estate of Julia Clarke, late of the city of Columbia, State of South Carolina, and have compared all of the foregoing with the original thereof now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, on this 27th day of August, A. D. 1897.

[SEAL.] PATRICK PHELAN, *Clerk.*

STATE OF CONNECTICUT, }
County of Fairfield, } ss:

BRIDGEPORT.

I, Albert M. Tallmadge, sole and presiding judge of the court of probate, within and for the district of Bridgeport, in said county of Fairfield, hereby certify that Patrick Phelan, whose name is above written and subscribed, is, and was at the date thereof, clerk of the court of probate, within and for the district of Bridgeport, in said Fairfield county, and keeper of the records and seal thereof, duly commissioned and sworn, that I am well acquainted with his signature, and know the above to be his, and that the above certificate

by him made is in due form to authenticate the records, files and proceedings of said court.

In testimony whereof, I have hereunto set my hand this 27th day of August, A. D. 1897.

ALBERT M. TALLMADGE, *Judge.*

59 STATE OF CONNECTICUT, } ss:
County of Fairfield, }

BRIDGEPORT.

I, Patrick Phelan, clerk of the court of probate, within and for the district of Bridgeport, in said county of Fairfield, hereby certify that Albert M. Tallmadge, whose name is within written and subscribed, is, and was at the date thereof, sole and presiding judge of the court of probate, within and for the district of Bridgeport, in said Fairfield county, duly commissioned and sworn; that I am well acquainted with his signature, and know the above to be his.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, on this 27th day of August, A. D. 1897.

•[SEAL.] PATRICK PHELAN, *Clerk.*

HENRY P. CLARKE'S APPEAL FROM PROBATE.

Order of Notice.

STATE OF CONNECTICUT, } ss:
Fairfield County, }

BRIDGEPORT, *Oct.* 4, *A. D.* 1897.

Upon the appeal of the said Henry P. Clarke from the order and decree of the court of probate, for the district of Bridgeport, now pending in the superior court in and for Fairfield county.

It appearing to and being found by the subscribing authority, that Nancy Barnum Clarke, appellee in the above-entitled case, is absent from this State, residing in Columbia, State of South Carolina.

Therefore ordered, that notice of the pendency of said appeal be given by leaving a copy of said appeal and this order of notice with the said Nancy Barnum Clarke, on or before the 11th day of October, A. D. 1897, by some proper officer or indifferent person.

WM. R. SHELTON,
Clerk of the Superior Court for Fairfield County.

60 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Proof of Service of Appeal and Order on Nancy Barnum Clarke.

Personally appears before me, Thomas D. Green, and made oath that on the eighth day of October, 1897, he served Nancy Barnum Clarke with a copy of Henry P. Clarke's appeal from the order and decree of the court of probate for the district of Bridgeport, now pending in the superior court in and for Fairfield county, State of Connecticut, by leaving with her a copy of said appeal at Asheville,

N. C., where she temporarily resides with her father, the said Henry P. Clarke, and that he also left with her a copy of the notice of the pendency of said appeal on or before the 11th day of October, 1897, and deponent says that he is not related to either Henry P. Clarke or Nancy Barnum Clarke and has no interest in said appeal.

Sworn to before me Oct. 8th, 1897.

F. C. H. DUKES,
Notary Public.

[NOTARIAL SEAL.]

(Filed Oct. 28, 1897.
WM. R. SHELTON, *Clerk.*)

HENRY P. CLARKE'S APPEAL FROM PROBATE.

Superior Court, Fairfield County, October 12, 1897.

Order of Court Appointing Guardian ad Litem.

It appearing to the court that Nancy B. Clarke, appellee in the above-entitled action, is an infant of the age of nine years and that she has been duly personally served with the appeal and order of notice in the above-entitled action, and an application having been duly made to the court for the appointment of a guardian *ad litem* to appear and defend said action on her behalf; and it appearing to the court that John H. Perry, Esq., is a fit and proper person to act as such guardian *ad litem*, it is hereby

Ordered, that the said John H. Perry be and he is hereby appointed such guardian *ad litem* and is authorized and directed to appear and defend said action in her behalf.

By the court:

WM. R. SHELTON, *Clerk.*

61 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Superior Court, Fairfield County, October 12, 1897.

Reasons of Appeal.

For reasons of appeal in the above-named proceeding, the appellant assigns the following:

I.

1. The estate of the intestate in the State of Connecticut consisted of property, all of which is for purposes of distribution, and for the purpose of the ascertainment of heirs and distributees, personal estate.

2. The intestate was, at the time of her death, domiciled in the State of South Carolina and her estate has ever since the first day of February, 1897, been in due process of settlement in the proper courts of that State.

3. By the laws of South Carolina, the appellant was and is entitled to a distributive share in all the personal estate of the intestate.

II.

1. The court erred in assuming to ascertain the heirs and distributees of the intestate, as all of the estate of the intestate for the purpose of the hearing then before the court consisted of personal property, and the courts of South Carolina alone had jurisdiction to fix and ascertain the heirs and distributees.

III.

1. The court erred in not dismissing the petition for want of jurisdiction to grant the relief prayed for in the application.

By STODDARD & BISHOP, *Attorneys.*

(Filed Oct. 12, 1896.
WM. R. SHELTON, *Clerk.*)

62 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Superior Court, Fairfield County, October 12, 1897.

Reply to Reasons of Appeal.

Paragraph one of the first reason of appeal is denied.
Paragraphs two and three are admitted.
The second and third reasons of appeal are denied.

NANCY B. CLARKE,
By her guardian *ad litem*, JOHN H. PERRY.

(Filed Oct. 12, 1897.
WM. R. SHELTON, *Clerk.*)

HENRY P. CLARKE'S APPEAL FROM PROBATE.

Superior Court, Fairfield County, October 12, 1897.

Finding of Facts and Reservation.

Finding.

1. Henry P. Clarke, the appellant, while domiciled in the State of South Carolina, intermarried with Julia Hurd, in the State of New York, in the year 1886, and the married couple immediately returned to the State of South Carolina, which then became their domicile of marriage.

2. In 1889, a daughter, Nancy B. Clarke, was born, who still survives, and is the appellee herein.

3. In December, 1893, another daughter, Julia Clarke, the distribution of whose estate is now in question, was born. There were no other children born of said marriage.

4. On February 10, 1894, the wife, Julia H. Clarke, died.

5. On May 20, 1894, the daughter, Julia Clarke, died, leaving no creditors.

6. At all times after said marriage the State of South Carolina has been the domicile of the appellant and his family.

7. During coverture and at the day of the dates thereof the
63 said Julia H. Clarke made and executed the will and codicil hereunto annexed and marked Exhibits A and B respectively.

8. Said will and codicil were duly established in the court of probate for Richland county in the State of South Carolina, and copies thereof have become part of the files and records of the probate court for the district of Bridgeport, pursuant to the provisions of sec. 550 Gen'l Statutes.

9. The daughter, Julia Clarke, owned no property in Connecticut at the time of her decease except such as had or should come to her under her mother's aforesaid will.

10. The property of the mother, Julia H. Clarke, possessed by her at the time of her decease consisted of $825.25 in personalty, the home plantation in South Carolina valued at $20,000, and real estate in Bridgeport, in this State, valued at $138,000, which last-mentioned property was distributed to her the day before her death in a partial distribution of the estate of her grandfather, P. T. Barnum, who died April 7, 1891, leaving a will under which she took a legacy of $100,000, (paid before said partial distribution) and one-sixth of the residue of his estate.

11. The estate of the daughter, Julia Clarke, referred to in the petition to the court of probate, consisted of an undivided one-third interest in the real estate so as above distributed to her mother. The value of the said Julia H. Clarke's entire interest in the estate of her grandfather was several hundred thousand dollars.

12. Both real estate and personal property of large value remained in the said Barnum residue at the death of the mother, Julia H. Clarke, for future distribution. The real estate so remaining is situated in Connecticut, New York and Kansas.

13. Henry P. Clarke (the appellant herein) "as executor of the last will and testament of Julia H. Clarke and trustee of the estate of Nancy B. Clarke, his infant daughter, under said will" brought suit against Nancy B. Clarke (the appellee herein) in the circuit court for the fifth judicial circuit of South Carolina, praying for the "judgment and direction of the court in regard to the true construction of said will and especially the fifth and residuary paragraph thereof, and as to his powers and duties as such executor and trustee under said will in the premises and for such further relief as may be just and proper."

64 A guardian *ad litem* was appointed for the infant defendant, who duly answered, and, after hearing had, the court "ordered, adjudged and decreed that the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personalty at the time of her death of all her real estate of whatsoever description and wheresoever situated, and that the plaintiff as executor, receive, administer and account for the same as personalty, and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree."

14. This judgment was upon appeal subsequently affirmed by the court of last resort in South Carolina, as will appear by reference to the report thereof in 46 So. Car., 230, which is hereby made a part hereof, and said decision was considered by the probate court from which the appeal is taken.

15. By the law of the State of South Carolina, the court to which the action was brought, mentioned in paragraph 13 hereof, had jurisdiction both of the persons and of the subject-matter of that suit, and by a like law the appellant shared equally with his surviving child in the distribution of the estate of the deceased.

16. The intestate was at the time of her death domiciled in the State of South Carolina and her estate has, ever since the first day of February, 1897, been in due process of settlement in the proper courts of that State.

17. Nancy B. Clarke has had actual notice of the pendency of this appeal, and John H. Perry, Esq., has been duly appointed by this court her guardian *ad litem*.

EXHIBIT A.

I, Julia H. Clarke, wife of Henry P. Clarke, residing near Eastover, in Richland county, State of South Carolina, being of sound and disposing mind and memory, do make and ordain this my last will and testament and hereby revoke all other wills by me at any time heretofore made.

First: I direct that all my just debts and my funeral expenses shall be fully paid by my executor hereinafter named.

Second: I direct that a portion of my estate sufficient to produce one thousand dollars ($1,000) annually, shall be safely in-
65 vested by my executor and the said one thousand dollars be paid annually to my father, S. H. Hurd, now of New York city, in quarterly payments, during the term of his natural life.

Third: I give and bequeath to Mrs. Laura Sherwood, of Bridgeport, Connecticut, the sum of ten thousand dollars, ($10,000).

Fourth: I give and bequeath to Miss Agnes C. Patterson, of said Bridgeport, the sum of five thousand ($5,000) dollars.

Fifth: The rest, residue and remainder of my estate, real and personal, of whatever description or wheresoever situated, I give, devise and bequeath as follows: One-half thereof to my husband, Henry P. Clarke, and one-half thereof to my said husband in trust for my daughter, Nancy, until she becomes twenty-five years of age, and then to pay the whole sum over to her. But if she shall marry before that age with the consent and approval of her father, or in case of his death, with the consent and approval of her then guardian, then I direct that one-half of her share shall be paid to her upon her marriage and the other half when she becomes twenty-five.

In case I shall leave surviving me one or more children beside my daughter Nancy, then I direct that the said rest, residue and remainder of my estate shall be divided equally among my said husband and all of my children, share and share alike, my husband and my children sharing *per capita*, and the shares of said children

to be held in trust as above provided in the case of Nancy as being the only one.

And I give devise and bequeath the said rest, residue and remainder as aforesaid, to each and to their heirs and each of them forever.

I constitute and appoint my said husband, Henry P. Clarke, to be executor and trustee of this my will, and direct that no bonds be required of him under either appointment.

In witness whereof, I have hereunto set my hand and seal at Bridgeport, Connecticut, this twenty-fifth (25th) day of May, A. D. 1891.

JULIA H. CLARKE. [SEAL.]

Signed, sealed, published and declared as and for her last will and testament by the said Julia H. Clarke in our presence, who in her presence and at her request, and in the presence of each other, have signed our names as witnesses thereto.

WILLIAM H. COMLEY, Bridgeport, Conn.
JOSEPH J. ROSE, " "
GEORGE P. CARROLL, " "

66 STATE OF CONNECTICUT, } ss:
County of Fairfield, }

BRIDGEPORT, *May* 26, 1891.

Personally appeared before me, William H. Comley, Joseph J. Rose and George P. Carroll, who, each being duly sworn by me, deposes and says, that they were present and saw Julia H. Clarke sign the foregoing will and heard her declare the same to be her last will and testament. That she signed said will in the presence of all of said witnesses and they each subscribed said will as witnesses in her presence, in the presence of each other, and at her request, and that at the time of signing said will she appeared to be of lawful age, and they and each of them believe her to have been of sound mind and memory, and they make this affidavit at her request.

WILLIAM H. COMLEY.
JOSEPH J. ROSE.
GEORGE P. CARROLL.

Subscribed and sworn to before me this 26th day of May, A. D. 1891.

[SEAL.] CHARLES SHERWOOD,
Notary Public. State of Connecticut.

EXHIBIT B.

State OF COLUMBIA, }
County of Richland. }

I, Mrs. Julia H. Clarke, wife of Henry P. Clarke, formerly residing near Eastover, in the county and State aforesaid, but now residing in the city of Columbia, of said county and State, having made my

last will and testament bearing date the 25th day of May, A. D. 1891, at Bridgeport, in the State of Connecticut, do now make this codicil to be taken as a part of the same.

First: I hereby ratify and confirm my said will in every respect save as far as any part of it is inconsistent with this codicil.

Second, I hereby revoke the third *item* of said will, and in lieu thereof I will and direct that a portion of my estate sufficient to produce five hundred dollars annually, shall be safely invested by my executor, and the said five hundred be paid annually in quarterly payments to Mrs. Laura Sherwood, of Bridgeport, Conn., during the term of her natural life.

Three: I further will and direct that after the death of said Mrs. Laura Sherwood that the portion of my estate which shall at that time be invested for her benefit under the second item of this
67 codicil, shall then become a portion of my estate, and is hereby disposed of as directed in item five of my said will; and I further direct that if said Mrs. Laura Sherwood shall die before my death then the investment directed for her benefit under item two of this codicil, shall be and is hereby disposed of as directed in item five of my said will.

Four: I further will and direct that after the death of my said father, S. H. Hurd, that the portion of my estate which shall at that time be invested for his benefit as directed in item two of said will, shall then become a portion of my estate and shall be disposed of as directed in item five of my said will; and I further direct that if my said father shall die before my death then the investment directed for his benefit in said item two shall be disposed of as directed in item five of my said will.

In witness whereof, I, the said Julia H. Clarke, have hereunto subscribed my name and set my seal to the foregoing codicil of four items, at Columbia, in the said State, this the 11th day of November, A. D. 1893.

JULIA H. CLARKE. [L. S.]

Signed, sealed, published and declared by the said Julia H. Clarke, the testatrix, as and for her codicil to her last will and testament in the presence of us, who at her request, in her presence and in the presence of each other, have hereunto subscribed our names as witnesses.

ELEANOR R. BENNETT.
JOHN S. VERNER.
F. H. WESTON.

HENRY P. CLARKE'S APPEAL FROM PROBATE.

Fairfield County Superior Court, October 12, 1897.

Reservation.

The court finds the facts in the above-entitled case to be as set forth in the above finding of facts, and with the consent of all the parties to said cause, all the questions of law which may arise or

may be raised upon the record in said cause, and as to what advice shall be given and to whom, or what judgment should be rendered in said case, are hereby reserved for the consideration and
68 advice of the supreme court of errors to be held at Bridgeport, within and for the third judicial district, on the fourth Tuesday of October, A. D. 1897.

ELMER, *Judge.*

(Filed Oct. 12, 1897.
WM. R. SHELTON, *Clerk.*)

HENRY P. CLARKE, OF COLUMBIA, SOUTH CAROLINA. APPEAL FROM PROBATE.

Superior Court, Fairfield County, March 4, 1898.

Judgment.

The above-entitled cause came to this court on the first Tuesday of September, 1897.

The appellant appeared and this court, on the fourth day of October, 1897, ordered notice of the pendency of said appeal to be given to Nancy Barnum Clarke, the appellee therein, as by said order on file will more fully appear.

Said order was duly complied with, and on the 12th day of October, 1897, this court appointed John H. Perry, Esq., guardian *ad litem* to appear and defend said action, in behalf of the said Nancy B. Clarke, appellee. Thereupon the said appellant and the said Nancy B. Clarke, by her said guardian *ad litem*, appeared and were at issue as on file and upon hearing duly had, this court found the facts as follows:

1. Henry P. Clarke, the appellant, while domiciled in the State of South Carolina, intermarried with Julia Hurd, in the State of New York, in the year 1886, and the married couple immediately returned to the State of South Carolina, which then became their domicile of marriage.

2. In 1889, a daughter, Nancy B. Clarke, was born, who still survives and is the appellee herein.

3. In December, 1893, another daughter, Julia Clarke, the distribution of whose estate is now in question, was born. There were no other children born of said marriage.

4. On February 10, 1894, the wife, Julia H. Clarke, died.

5. On May 20, 1894, the daughter, Julia Clarke, died, leaving no creditors.

69 6. At all times after said marriage the State of South Carolina has been the domicile of the appellant and his family.

7. During coverture and at the day of the dates thereof, the said Julia H. Clarke made and executed the will and codicil hereunto annexed and marked Exhibits A and B respectively.

8. Said will and codicil were duly established in the court of probate for Richland county in the State of South Carolina, and copies thereof have become part of the files and records of the probate

court for the district of Bridgeport, pursuant to the provisions of sec. 550, Gen'l Statutes.

9. The daughter, Julia Clarke, owned no property in Connecticut at the time of her decease except such as had or should come to her under her mother's aforesaid will.

10. The property of the mother, Julia H. Clarke, possessed by her at the time of her decease consisted of $825.25 in personalty, the home plantation in South Carolina valued at $20,000, and real estate in Bridgeport, in this State, valued at $138,000, which last-mentioned property was distributed to her the day before her death in a partial distribution of the estate of her grandfather, P. T. Barnum, who died April 7, 1891, leaving a will under which she took a legacy of $100,000 (paid before said partial distribution), and one-sixth of the residue of his estate.

11. The estate of the daughter, Julia Clarke, referred to in the petition to the court of probate, consisted of an undivided one-third interest in the real estate so as above distributed to her mother. The value of the said Julia H. Clarke's entire interest in the estate of her grandfather was several hundred thousand dollars.

12. Both real estate and personal property of large value remained in the said Barnum residue at the death of the mother, Julia H. Clarke, for future distribution. The real estate so remaining is situated in Connecticut, New York and Kansas.

13. Henry P. Clarke (the appellant herein) "as executor of the last will and testament of Julia H. Clarke and trustee of the estate of Nancy B. Clarke, his infant daughter, under said will" brought suit against Nancy B. Clarke (the appellee herein), in the circuit court for the fifth judicial circuit of South Carolina, praying for the "judgment and direction of the court in regard to the true con-
70 struction of said will and especially the fifth and residuary paragraph thereof, and as to his powers and duties as such executor and trustee under said will in the premises and for such further relief as may be just and proper."

A guardian *ad litem* was appointed for the infant defendant, who duly answered, and, after hearing had, the court "ordered, adjudged and decreed that the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personalty at the time of her death of all her real estate of whatsoever description and wheresoever situated, and that the plaintiff as executor, receive, administer and account for the same as personalty, and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree."

14. This judgment was upon appeal subsequently affirmed by the court of last resort in South Carolina, as will appear by reference to the report thereof in 46 So. Car., 230, which is hereby made a part hereof, and said decision was considered by the probate court from which the appeal is taken.

15. By the law of the State of South Carolina, the court to which the action was brought, mentioned in paragraph 13 hereof, had jurisdiction both of the persons and of the subject-matter of that

suit, and by a like law the appellant shared equally with his surviving child in the distribution of the estate of the deceased.

16. The intestate was at the time of her death domiciled in the State of South Carolina and her estate has, ever since the first day of February, 1897, been in due process of settlement in the proper courts of that State.

17. Nancy B. Clarke has had actual notice of the pendency of this appeal, and Jol H. Perry, Esq., has been duly appointed by this court her guardian *ad litem*.

EXHIBIT A.

I, Julia H. Clarke, wife of Henry P. Clarke, residing near Eastover, in Richland county, State of South Carolina, being of sound and disposing mind and memory, do make and ordain this my last will and testament and hereby revoke all other wills by me at any time heretofore made.

71 First: I direct that all my just debts and my funeral expenses shall be fully paid by my executor hereinafter named.

Second: I direct that a portion of my estate sufficient to produce one thousand dollars ($1,000) annually, shall be safely invested by my executor and the said one thousand dollars be paid annually to my father, S. H. Hurd, now of New York city, in quarterly payments, during the term of his natural life.

Third: I give and bequeath to Mrs. Laura Sherwood, of Bridgeport, Connecticut, the sum of ten thousand dollars ($10,000).

Fourth: I give and bequeath to Miss Agnes C. Patterson, of said Bridgeport, the sum of five thousand dollars ($5,000).

Fifth: The rest, residue and remainder of my estate, real and personal, of whatever description or wheresoever situated, I give, devise and bequeath as follows: One-half thereof to my husband, Henry P. Clarke, and one-half thereof to my said husband in trust for my daughter, Nancy, until she becomes twenty-five years of age, and then to pay the whole sum over to her. But if she shall marry before that age with the consent and approval of her father, or in case of his death, with the consent and approval of her then guardian, then I direct that one-half of her share shall be paid to her upon her marriage and the other half when she becomes twenty-five.

In case I shall leave surviving me one or more children beside my daughter Nancy, then I direct that the said rest, residue and remainder of my estate shall be divided equally among my said husband and all of my children, share and share alike, my husband and my children sharing *per capita*, and the shares of said children to be held in trust as above provided in the case of Nancy as being the only one.

And I give devise and bequeath the said rest, residue and remainder as aforesaid, to each and to their heirs and each of them forever.

I constitute and appoint my said husband, Henry P. Clarke, to be

executor and trustee of this my will, and direct that no bonds be required of him under either appointment.

In witness whereof, I have hereunto set my hand and seal at Bridgeport, Connecticut, this twenty-fifth (25th) day of May, A. D., 1891.

JULIA H. CLARKE. [SEAL.]

Signed, sealed, published and declared as and for her last will and testament by the said Julia H. Clarke in our presence, who in her presence and at her request, and in the presence of each
72 other, have signed our names as witnesses thereto.

WILLIAM H. COMLEY, *Bridgeport, Conn.*
JOSEPH. J. ROSE, " "
GEORGE P. CARROLL, " "

STATE OF CONNECTICUT, }
County of Fairfield, } *ss:*

BRIDGEPORT, *May* 26, 1891.

Personally appeared before me, William H. Comley, Joseph J. Rose and George P. Carroll, who, each being duly sworn by me, deposes and says, that they were present and saw Julia H. Clarke sign the foregoing will and heard her declare the same to be her last will and testament. That she signed said will in the presence of all of said witnesses and they each subscribed said will as witnesses in her presence, in the presence of each other, and at her request, and that at the time of signing said will she appeared to be of lawful age, and they and each of them believe her to have been of sound mind and memory, and they make this affidavit at her request.

WILLIAM H. COMLEY.
JOSEPH J. ROSE.
GEORGE P. CARROLL.

Subscribed and sworn to before me this 26th day of May, A. D. 1891.

[SEAL.] CHARLES SHERWOOD,
Notary Public, State of Connecticut.

EXHIBIT B.

State OF COLUMBIA, }
County of Richland. }

I, Mrs. Julia H. Clarke, wife of Henry P. Clarke, formerly residing near Eastover, in the county and State aforesaid, but now residing in the city of Columbia, of said county and State, having made my last will and testament bearing date the 25th day of May, A. D. 1891, at Bridgeport, in the State of Connecticut, do now make this codicil to be taken as a part of the same.

First: I hereby ratify and confirm my said will in every respect save as far as any part of it is inconsistent with this codicil.
73 Second: I hereby revoke the third *item* of said will, and in lieu thereof I will and direct that a portion of my estate

sufficient to produce five hundred dollars annually, shall be safely invested by my executor, and the said five hundred be paid annually in quarterly payments to Mrs. Laura Sherwood, of Bridgeport, Conn., during the term of her natural life.

Three: I further will and direct that after the death of said Mrs. Laura Sherwood that the portion of my estate which shall at that time be invested for her benefit under the second item of this codicil, shall then become a portion of my estate, and is hereby disposed of as directed in item five of my said will; and I further direct that if said Mrs. Laura Sherwood shall die before my death then the investment directed for her benefit under item two of this codicil, shall be and is hereby disposed of as directed in item five of my said will.

Four: I further will and direct that after the death of my said father, S. H. Hurd, that the portion of my estate which shall at that time be invested for his benefit as directed in item two of said will, shall then become a portion of my estate and shall be disposed of as directed in item five of my said will; and I further direct that if my said father shall die before my death then the investment directed for his benefit in said item two shall be disposed of as directed in item five of my said will.

In witness whereof, I, the said Julia H. Clarke, have hereunto subscribed my name and set my seal to the foregoing codicil of four items, at Columbia, in the said State, this the 11th day of November, A. D. 1893.

JULIA H. CLARKE. [L. S.]

Signed, sealed, published and declared by the said Julia H. Clarke, the testatrix, as and for her codicil to her last will and testament in the presence of us, who at her request, in her presence and in the presence of each other, have hereunto subscribed our names as witnesses.

ELEANOR R. BENNETT.
JOHN S. VERNER.
F. H. WESTON.

Upon the facts aforesaid the appellant claimed and contended that the decision and decree of the circuit court for the 5th judicial circuit of the State of South Carolina, being the court of common pleas and general sessions for Richland county, affirmed by the supreme court of said State, 46 So. Car., 230, in the case of Henry P.
74 Clarke, executor and trustee, against Nancy B. Clarke, in its interpretation and construction of the will of the said Julia H. Clarke, to the effect that said will worked an equitable conversion into personalty at the time of her death of all the real estate of the testatrix wherever situated, was binding and conclusive on the courts of this State in his favor in this proceeding, and that to hold otherwise would be to deny full faith and credit to the judicial proceedings and judgment of the State of South Carolina, and would be in contravention of section 1, article 4, of the Constitution of the United States.

And the appellant further claimed, in case said last claim was overruled, that the said will by a proper construction and interpretation thereof, worked an equitable conversion of all the real estate of the testatrix into personalty.

The appellee controverted the aforesaid claims of the appellant.

Whereupon all the questions of law which arise or might be raised upon the record in said cause, and the question as to what judgment should be rendered therein, were reserved for the consideration and advice of the supreme court of errors, to be held at Bridgeport, within and for the third judicial district, on the 4th Tuesday of October, A. D. 1897, which said court on the 6th day of January, 1898, advised this court to overrule the appellant's claims and to affirm the decree of the court of probate appealed from.

Whereupon the said cause having come by legal continuance to this present day, the parties aforesaid again appeared and were duly heard, and pursuant to the advice of the supreme court of errors this court overrules the claims of the appellant, as above set forth, and the judgment of this court is that the order and decree of the court of probate appealed from be and the same is hereby affirmed.

THAYER, *J.*

75 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Superior Court, Fairfield County, March 8, 1898.

Appellant's Notice of Appeal.

The appellant in the above-entitled appeal, within one week after the rendition of the judgment in said cause and in pursuance of section 4 of chapter 194 of the Public Acts of 1897, hereby appeals from the judgment of the superior court in said cause.

By STODDARD & BISHOP,
His Attorneys.

(Filed March 9, 1898.
WM. R. SHELTON, *Clerk.*)

HENRY P. CLARKE'S APPEAL FROM PROBATE.

Superior Court, Fairfield County, March 12, 1898.

Appellant's Appeal.

In the above-entitled cause the appellant appeals from the judgment of said court, to the supreme court of errors, next to be holden at Bridgeport, on the third Tuesday of April, 1898, in and for the third judicial district, for the revision of the errors which he claims to have occurred on the trial thereof, and for reasons of said appeal he assigns the following:

1. That the court erred and mistook the law in holding and deciding on the facts found that the order and decree of the court of probate appealed from should be affirmed.

2. That the court erred in everruling the claim of the appellant

that the decision and decree of the circuit court for the fifth judicial circuit of the State of South Carolina, being the court of common pleas and general sessions for Richland county, as affirmed by the supreme court of said State, in the case of Henry P. Clarke, executor and trustee, against Nancy B. Clarke, in its interpretation and construction of the will of Julia H. Clarke, to the effect that said will worked an equitable conversion into personalty at the time of her death of all the real estate of the testatrix wherever situated, was binding and conclusive on the courts of this State, in favor of said Henry P. Clarke, in this proceeding, and that to hold other-
76 wise would be to deny full faith and credit to the judicial proceedings and judgment of the State of South Carolina, and would be in contravention of section 1, article 4 of the Constitution of the United States.

3. The court erred in overruling the claim of the appellant that the will of the said Julia H. Clarke worked an equitable conversion of all the real estate of the testatrix into personalty.

He, therefore, prays for such relief as is provided by law in the premises.

By STODDARD & BISHOP,
His Attorneys.

I certify that the foregoing appeal was filed on the 12th day of March, A. D. 1898, and Goodwin Stoddard, of Bridgeport, Connecticut, is recognized in the sum of one hundred dollars, conditioned that the said Henry P. Clarke shall prosecute said appeal to effect, and pay all costs therein if he shall fail to do so; and said appeal is hereby allowed.

WM. R. SHELTON, *Clerk.*

Superior Court, Fairfield County.

CLERK'S OFFICE.

The above and foregoing is a true copy of record in said superior court.

Attest: WM. R. SHELTON, *Clerk.*

Supreme Court of Errors, Fairfield County.

CLERK'S OFFICE.

The above and foregoing is a true copy of record in said supreme court of errors.

Attest: WM. R. SHELTON, *Clerk.*

77 At a supreme court of errors in the third judicial district, holden at Bridgeport on the third Tuesday of April, 1898.

HENRY P. CLARKE, OF COLUMBIA, SOUTH CAROLINA. APPEAL FROM PROBATE.

HENRY P. CLARKE, of Columbia, South Carolina, Appellant,
—
NANCY B. CLARKE, by Her Guardian *ad Litem*, John H. Perry, Appellee.

On Appeal from the Superior Court. No. 5.

This appeal by the appellant, claiming error in the process, record, and judgment and in the proceedings and decisions of the court on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts on file in this court, was allowed by the superior court for Fairfield county on the 12th day of March, 1898, and came to this court at its session at Bridgeport on the third Tuesday of April, 1898, when the parties appeared and were fully heard; and now this court finds that in the record, judgment, and proceedings of said superior court there is no error.

It is therefore considered and adjudged that there is no error, and that the appellee recover of the appellant $— costs.

By the court:

WM. R. SHELTON, *Clerk.*

78 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Per Curiam:

It is stated by the counsel for the appellant that this appeal has been taken in order to lay a foundation for a writ of error from the Supreme Court of the United States.

It was unnecessary for that purpose. Such writs of error run to the highest court of the State in which a decision in the suit could be had. U. S. Rev. Stat., § 709. In the present case the superior court may properly be regarded as occupying that position. On the reservation upon which it previously came here (Clarke's appeal from probate, 70 Conn., 195) the superior court was advised to render the precise judgment which is the subject of this appeal. This advice was mandatory. No other decision could have been pronounced by the superior court than that which was pronounced. It was the last word of the judicial authority of this State. No right remained to review here a judgment which this court had on full consideration advised the superior court to render. It was therefore reviewable on a writ of error issuing directly to that court from the Supreme Court of the United States. Gregory *v.* McVeigh, 23 Wall., 294; Foote *v.* Women's Board of Missions, 162 U. S., 439. It is true, however, that under circumstances quite similar such writs have been addressed to the highest court in the State, and that this court has recognized the validity of that method of procedure. Atherton *v.* Fowler, 91 U. S., 143; New Haven & Northampton Co. *v.* State, 44 Conn., 376, 392. The latter decision
79 was given at a time when the practice in this respect upon writs of error from the Supreme Court of the United States

to State courts could not be considered as fully settled. We shall on this occasion follow the precedent thus established, but have thought it proper to explain our views at length as to the correct practice, so that appeals of this character may not hereafter be unnecessarily brought.

There is no error.

80 STATE OF CONNECTICUT, } ss:
County of Fairfield, }

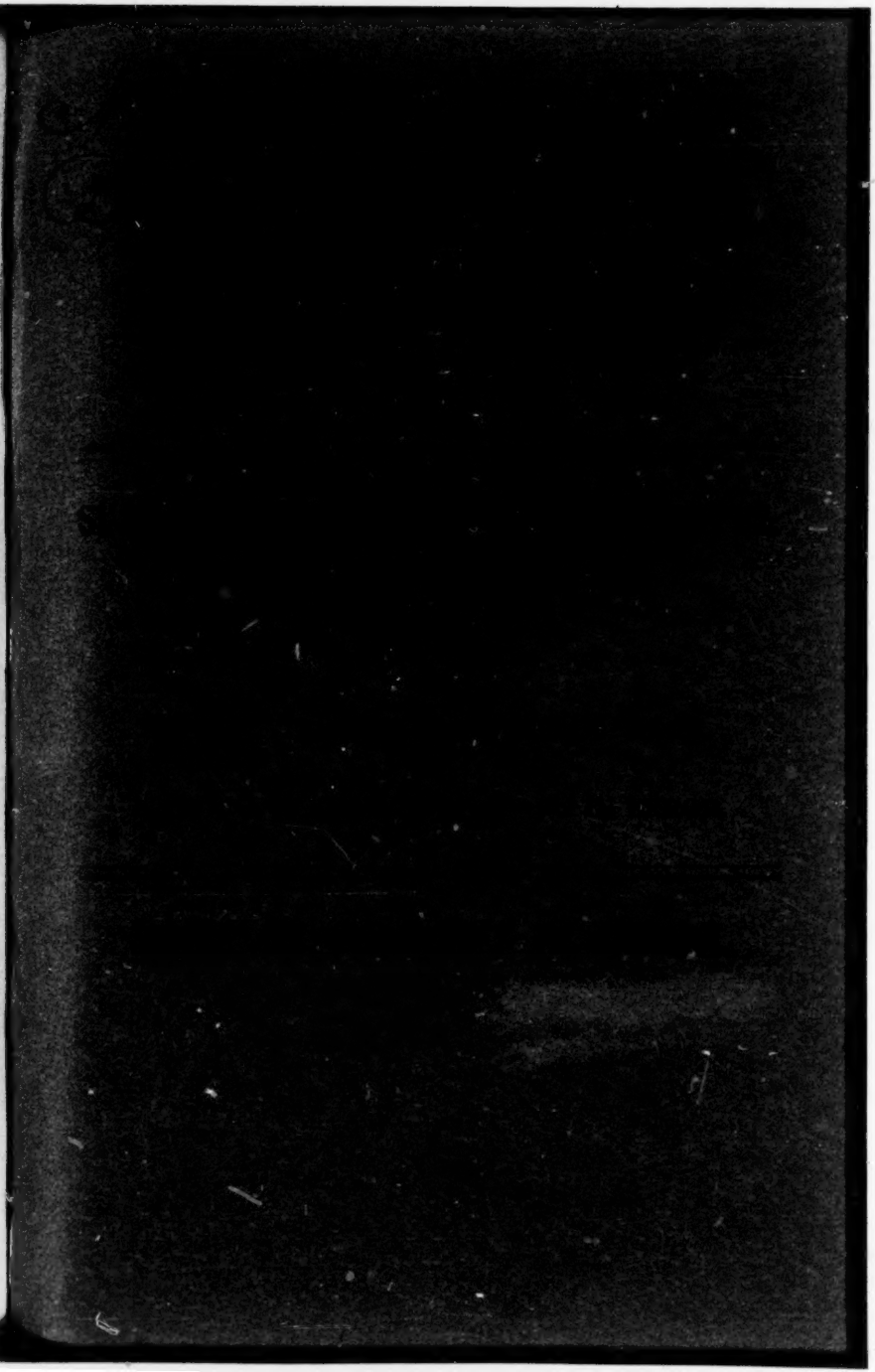
I, William R. Shelton, clerk of the supreme court of errors of the State of Connecticut within and for the third judicial district and keeper of the seal thereof, hereby certify that the above and foregoing is a true copy of the record and of all proceedings in the cause of Henry P. Clarke's appeal from probate.

Seal Supreme Court of Errors, Conn.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Bridgeport, in said county and State, this 16th day of February, 1899.

WM. R. SHELTON, *Clerk.*

Endorsed on cover: File No., 17,303. Connecticut supreme court of errors. Term No., 718. Henry P. Clarke, plaintiff in error, *vs.* Nancy B. Clarke, John H. Perry, guardian *ad litem* of Nancy B. Clarke, & Henry P. Clarke, as administrator of the personal estate of Julia Clarke, deceased. Filed February 18, 1899.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 216.

HENRY P. CLARKE, PLAINTIFF IN ERROR,

vs.

NANCY B. CLARKE, DEFENDANT IN ERROR.

STATEMENT.

Henry P. Clarke, the plaintiff in error in this cause, "as executor of the last will and testament of Julia H. Clarke, deceased, and trustee of the estate of Nancy B. Clarke, his infant daughter," under said will brought suit against Nancy B. Clarke, the defendant herein, in the Circuit Court for the Fifth Judicial Circuit of South Carolina, praying for "the judgment and direction of the Court in regard to the true construction of said will, and especially the fifth and residuary paragraph thereof, and as to his powers and duties as such executor and trustee under said will, in the premises, and for such further relief as may be just and proper." (Transcript of record, page 14; finding of fact, 13.) A guardian *ad litem* was appointed for the said infant defendant, who duly answered, and, after hearing had, the said Court "ordered, adjudged and decreed, that the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personalty, at the time of her death, of all her real estate, of whatsoever description, and wheresoever situated, and that the plaintiff, as executor, receive, administer and account for the same, as personalty, and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree." (Transcript of record, pages 14 and 15; finding of fact, 13.)

This judgment was, upon appeal, subsequently affirmed by the Court of last resort in South Carolina, as will appear by reference to the report thereof, in 46 So. Ca., 230—which, in the finding of facts, page 15, finding 14, is a part of the record.

By the law of the State of South Carolina, the Court in which

the said action was brought, mentioned in said finding of fact, 13, had jurisdiction both of the persons and subject matter of that suit, and by a like law the plaintiff in error shared equally with the defendant, his surviving child, in the distribution of the estate of his deceased daughter, Julia Clarke, who died after the death of her mother, on the 20th of May, 1894. Henry P. Clarke and his daughter, Nancy B. Clarke, were the only heirs at law of the infant, Julia Clarke, under the laws of South Carolina.

On the 1st day of February, 1897, after the filing of said decree and its confirmation by the Supreme Court of South Carolina, the said Henry P. Clarke became the administrator of the estate of said infant, Julia Clarke, who was at the time of her death domiciled in South Carolina, and her estate has ever since that date been in process of settlement in the proper Court of that State.

That thereafter the said Henry P. Clarke was granted letters of administration of the estate of said Julia Clarke by the Probate Court for the District of Bridgeport, in the State of Connecticut, ancillary to those granted to him of said estate in South Carolina. He thereupon filed his petition in said Court to ascertain to whom said estate should be distributed, to which cause Nancy B. Clarke and Henry P. Clarke were made parties by due notice, and were duly represented at the hearing thereof.

Upon such hearing, the said Probate Court found that the intestate was domiciled in the State of South Carolina at the time of her decease; that the entire inventoried assets of her estate in this State consists of an undivided interest in certain real estate, situated in the town of Bridgeport, of the value of $, which said interest was derived from the will of her mother, Julia H. Clarke, who died about four months prior to the decease of the intestate, domiciled in the State of South Carolina, an exemplified copy of whose will "and the decision of the Supreme Court of South Carolina interpreting the same, in a case in which the petitioner herein was plaintiff, and Nancy B. Clarke was defendant, is on file and of record in this Court, and hereby referred to, and whose estate is yet unsettled and undistributed."

"Wherefore, this Court finds and decrees that the sole heir and distributee is her aforesaid sister, Nancy B. Clarke." (Transcript of record, pages 7 and 8, folio 20.)

From this order Henry P. Clarke duly appealed to the Superior Court in and for the County of Fairfield, in the State of Connecticut, upon the following grounds:

1. That he is the father and surviving parent of the said Julia Clarke, deceased.

2. That he is the heir at law and distributee of the said Julia Clarke, deceased.

3. That he is aggrieved by the order and decree of this Court, made on the 3d day of July, A. D. 1897, as by said decree on file

more fully appears, declaring one Nancy B. Clarke, of said city of Columbia, to be the sole heir and distributee of the estate of the said Julia Clarke, deceased. (Transcript of record, page 8.)

The said Henry P. Clarke's reasons for appeal from said Probate to said Superior Court, are:

I.

1. The estate of the intestate in the State of Connecticut consisted of property, all of which is for purposes of distribution, and for the purposes of the ascertainment of the heirs and distributees, personal estate.

2. The intestate was, at the time of her death, domiciled in the State of South Carolina, and her estate has ever since the first day of February, 1897, been in due process of settlement in the proper Courts of that State.

II.

1. The Court erred in assuming to ascertain the heirs and distributees of the intestate, as all of the estate of the intestate for the purpose of the hearing then before the Court, consisted of personal property, and the Courts of South Carolina alone had jurisdiction to fix and ascertain the heirs and distributees.

III.

1. The Court erred in not dismissing the petition for want of jurisdiction to grant the relief prayed for in the application. (Transcript of record, pages 12 and 15.)

Paragraph one of the first reason of appeal was denied by the defendant, Nancy B. Clarke; paragraphs two and three are admitted by her, and the second and third reasons of appeal are denied. The finding of fact, the reservation of the case by the said Superior Court for the consideration, advice and judgment of the Supreme Court of Errors of the State of Connecticut will be found upon pages 13 to 18 of the transcript of record. The Court filed its decision on 5th day of January, 1898, in which it affirmed the decree of the Court of Probate.

The plaintiff in error makes the following assignment of errors, which he avers occurred in the final judgment of the Supreme Court of Errors of the State of Connecticut, April term, 1898, herein: That error was committed in deciding against the right specially set up and claimed by him under art. 4, sec. 1, Constitution of the United States, in this, that full faith and credit were not given to the judicial proceedings of the State of South Carolina, to wit: to the judgment of the Court of Common Pleas for Richland County, South Carolina, and the judgment of the Supreme Court of the State of South Carolina, of March 18, 1896, affirming the same in the case of Henry P. Clarke, as execu-

tor of the last will and testament of Julia H. Clarke, and trustee of the estate of Nancy B. Clarke, under said will, against Nancy B. Clarke, ordering, adjudging and decreeing that the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personalty, at the time of her death, of all her real estate of whatsoever description, and wheresoever situated, and that Henry P. Clarke, as executor, receive, administer and account for the same as personalty; and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree; and deciding, on the contrary, that the will of said Julia H. Clarke did not work an equitable conversion into personalty, at the time of her death, of the real estate of the said Julia H. Clarke, situate in the State of Connecticut; and that the said Nancy B. Clarke, defendant in error, was sole heir of a certain undivided interest of the real estate of the said Julia H. Clarke, in the State of Connecticut, which interest passed as real estate under her said will.

In the decree of Judge Baldwin, of the Supreme Court of Errors of Connecticut, he says, that, if the true construction of the will of Julia H. Clarke is, that said will works an equitable conversion of all the real estate of the testatrix, wherever situated, the decree of the Court of Probate for the District of Bridgeport, from which the present appeal was taken, was erroneous.

He then holds that the South Carolina decree was not conclusive on the defendant, Nancy B. Clarke.

1st. Because the parties to the judgment in South Carolina were not the same as those to the proceedings in the said Probate Court, and because the subject matter of the two causes are not the same; and then proceeds to a discussion of the subject of equitable conversion, as a new question, without respect to, or without giving full faith and credit to, the South Carolina judgment, which had held that the will of Mrs. Clarke worked an equitable conversion of her real estate into personalty, and concludes that said will did not work an equitable conversion of said realty into personalty.

The questions thus raised for the consideration of this Court are: 1st, are the parties to the said causes the same; 2d, is the subject matter of the two causes the same; and 3d, did the South Carolina Courts have jurisdiction of the subject matter of the said causes?

I propose to discuss these questions in the order thus stated.

The object of the proceedings by the administrator in the Probate Court of Bridgeport, Connecticut, was to administer the estate of Julia Clarke, which consisted, in fact, in an undivided share of real estate under the will of her mother, which the Courts of South Carolina had held was, by the terms of said will, converted into personalty; and which, under the statute laws of

South Carolina, the domicile of H. P. Clarke and Nancy B. Clarke, was to be divided equally between them.

In this proceeding in the said Probate Court of Bridgeport, Connecticut, the said will and the decree of the South Carolina Courts and the proceedings therein, were introduced, received in evidence, and considered by the said Probate Court. If the said will worked an equitable conversion of the real estate of Mrs. Clarke into personalty, then it was distributable under the laws of her domicile, and the only proper parties to that proceeding were the administrator, and Henry P. Clarke and Nancy B. Clarke, to whom it descended, under the laws of the domicile of Mrs. Clarke.

The Probate Judge, however, did not respect the construction of said will by the South Carolina Courts, and treated said estate of Julia Clarke as realty, which, under the laws of Connecticut, descended to Nancy B. Clarke, as the sole heir at law of Julia Clarke. In the South Carolina decree, the nominal parties were Henry P. Clarke, as executor, Henry P. Clarke, as trustee under said will of the estate of Nancy B. Clarke, and Nancy B. Clarke. To the proceeding in the Probate Court of Connecticut, the nominal parties were Henry P. Clarke, as administrator, Henry P. Clarke and Nancy B. Clarke.

Were not these parties really and substantially the same in both proceedings? We contend that they were. The South Carolina case was brought by Henry P. Clarke, as executor and as trustee, under the said will of Mrs. Julia H. Clarke. Henry P. Clarke was a legatee and devisee, and the trustee of the estate of Nancy B. Clarke and Julia Clarke under said will, and where a person occupies a representative capacity, and has a personal interest under the instrument giving him the representative character, he is bound by a judgment to which he was a party in either capacity. In the case of *Manigault* vs. *Deas*, Bailey's Equity S. C., pages 273 288 and 289, it is held that a decree in a suit brought by an executrix, in her own right, but to which she was a necessary party, as executrix, and in which the rights of her testator were adjudicated, is conclusive between the administrator, *de bonis non*, with the will annexed, of said testator, and the other parties to it, and cannot be re-examined in a subsequent suit between them.

In this case, the plaintiff, Mrs. Deas, brought an action against the Bank of the State of South Carolina to restrain the bank from selling, under a mortgage, given by Deas, her husband, and of whose estate she was executrix, thirty-six slaves, which she claimed came to her from the estate of her father. The said bank, in its answer, claimed that the marital rights of Mrs. Deas' husband attached to said slaves, and that he could, therefore, mortgage them. The Court held that, under the will of the father of Mrs. Deas, she only had a life estate, and that her husband, of

whose will she was executrix, could only mortgage this life estate to the bank.

Afterwards, the executors of one Manigault filed a bill in the Court of Equity against the said Mrs. Deas, as the executrix of David Deas, for the account of the assets of his estate, and she was also required by the complaint to account for the slaves held by her under her father's will, as part of the assets of her husband's estate. To this last action the said bank was also a party. The Court of Appeals of South Carolina held that, under her father's will, Mrs. Deas took an absolute estate in the slaves bequeathed to her; and that, by the marital rights of her husband, they had vested in him, and ordered the slaves sold for the debts of her husband, her testator. It also held, in this last case, that the said bank being a party to the former suit, was bound thereby, and could not share with the other creditors in the fruits of the last cause.

Judge O'Neal, in discussing the parties to the first case, says: "This is conclusive that she stood before the Court in the two-fold character of legatee under Humphrey Summer's will, and executrix of David Deas." It is not essential, says Mr. Starkie, in his Treatise on Evidence, vol. 1, page 194, "that either the parties or the form of action should be precisely the same, if they are substantially the same." And again, "so a record is evidence against one who might have been a party to it, for he cannot complain of the want of those advantages which he has voluntarily renounced." *Id.*, 194.

Mrs. Deas, as executrix, could not have questioned that decree against the bank, for in substance, if not in form, she was a party to it; and if she could not have questioned it, it follows that the bank could not have objected to it, as evidence in her favor.

In the case of *Small* vs. *Small*, 16 South Carolina, page 64, it is also held that where executors are sued in their representative capacity, that their individual interest in the property in litigation could be sold by the judgment against them as executors, they being legatees and devisees under the will of which they were the qualified executors.

In 53 South Carolina, page 318, *Verner and others* vs. *Bookman and others*, it is held that a judgment against an administrator, entered in book of abstracts of judgment in the office of the Clerk of the Court of Common Pleas, ascertaining and directing the payment of a final balance, in a suit for an accounting, is a judgment against the administrator individually. In the South Carolina Courts, Henry P. Clarke, as an individual, could never be heard or allowed to question the decree in a cause which he had brought as executor for the construction of a will under which he was a large beneficiary. He was before the Court in the said cause for the construction of his wife's will in a two-fold character, as executor and a beneficiary under said will, seeking the ad-

vice of the Court, and its interpretation of said will and his authority thereunder, and an attempt upon his part to act otherwise than directed by said Court would be trifling with justice.

In the South Carolina case, every possible interest was represented. H. P. Clarke was there as executor and trustee, and as a beneficiary under said will. In this two-fold capacity the whole suit was conducted by him, and resulted in a decree to his individual interest, in that the Court held that Mrs. Clarke's will worked an equitable conversion of her whole real estate into personalty, and if personalty, it was distributable under the law of the domicil, where he took an equal share with Nancy B. Clarke in Julia Clarke's estate, which was a part of Julia H. Clarke's estate. His personal interest being thus adjudged under this case, which he brought as executor, for the construction of said will, he could not be heard against said construction in any jurisdiction to the contrary thereof. He was not only before the Court as a beneficiary under the will of Mrs. Clarke, but also as a distributee at law of the estate of Julia Clarke, which consisted, under the said will, of an undivided one-third interest of Mrs. Julia H. Clarke's estate, which Henry P. Clarke held under the terms of said will as trustee. He being, therefore, the heir at law of Julia Clarke, was before the Court in this capacity, when he sued as executor and trustee, because the object of that suit was, to whom should he, as executor and trustee, account for the estate in his hands, after he had been advised as to what was the true character of that estate, under the terms of Mrs. Clarke's will. He and his daughter, Nancy B. Clarke, being the only heirs and distributees at law, under the South Carolina law, there was no necessity for an administrator of the estate of Julia Clarke in that cause, she having died an infant only four months old, and owing no debts.

In South Carolina, a bill for the distribution of an infant's estate may proceed without making an administrator of the infant a party. *Markley* vs. *Singletary*, 11 Rich. Eq. S. C., 393.

The reasons for this are plain: 1st, the infant owed no debts, and there was no use for an administrator; and, 2d, the property descended to the distributees and heirs at law, who were parties to the said cause.

The said South Carolina decree being, therefore, conclusive and binding on Mr. Clarke, as beneficiary under said will, and as one of the heirs at law of the undivided interest of Julia Clarke's share in said estate of which he was executor and trustee, in the South Carolina Courts, he is bound by that decision in every other jurisdiction where the subject matter of that cause is brought up again for adjudication between the same parties.

Where the judgment is conclusive between the parties in the State where it was rendered, it is equally so in every other State

and Court in the United States, 5 Wall., page 290, *Christmas* vs. *Russell.*

In this same case, it is said: "Indeed, the Court in effect say that the rule is undeniable that the judgment or decree of a Court possessing competent jurisdiction is final, not only as to the subject thereby determined, but as to every other matter which the parties might have litigated in the cause and which they might have decided. Same rule prevails in the Courts of New Hampshire, Rhode Island and Connecticut and most other States."

But Mr. Clarke is not only bound individually by the law of South Carolina, but by the universal rules of practice of the Courts of Chancery or Equity everywhere.

In Starkie on Evidence, page 331, it is said: "A record is also evidence against one who might have been a party to it, for he cannot complain of the want of those advantages which he has voluntarily renounced." Again, at page 334, "No one in general can be bound by a verdict or judgment, unless he be a party to the suit, or he be in privy with the party, *or possess the power* of *making himself a party.*"

In *Morton* vs. *Packwood,* 3 Annual Louisiana Reports, page 173, Chief Justice Eustis says: "We do not consider that it is at all material that the appearance and acts of the defendant were in his capacity of executor. His personal rights were asserted and determined upon. Had he been adjudged to account for the plaintiff's interest in the plantation and slaves, to restore it to the community, with its revenues, the judgment would have bound him, and could have been enforced against him. Being once a party to the record, it would have been a vain form to require him to appear personally against himself. Rather than to require such a thing, the law authorizes him to assert, at will, his personal rights in his representative capacity. We apprehend that such is the usage observed in the settlement of successions, under the directions of the Courts of Chancery. Where an executor is called upon to account, and he is a creditor, or an heir, or has claims on the property in his charge, and asserts those claims, and, on adjudication, they are maintained after litigation, in relation to them by competent parties, we are not aware that the judgment rendered can afterwards be drawn in question, on the ground of the representative capacity in which he asserted his rights. On this point, we have not been furnished with any authority from that system of jurisprudence, with which one of the learned counsel, Mr. Printiss, who argued this cause, is so familiar."

In *Denegre* vs. *Denegre,* 33 Louisiana Annual Reports, page 689, it is decided that an executrix who is also the widow in community of the testator, being sued in the former capacity only, but raising in her defense of the suit the issue of her rights, as usufructuary, will be personally concluded by the judgment, and

cannot afterwards attack its validity on the ground that she is not cited in her individual capacity.

In *Fouche, assignee, et al.,* vs. *Harrison, executor, et al.,* 78 Ga., page 410, Judge Bleckley, C. J., says: "We propose now to dispose, as briefly as possible, of the main case, in doing which, we shall rule principles rather than mere points. It is contended that when an executor files a bill as executor, he commits himself to nothing in his personal and individual character, that he is not a party otherwise than as representing the estate, and that pending the bill, he may act as freely, touching any individual right, or interest, involved, as if some other person were the complainant. To this doctrine we are quite unable to assent. On the contrary, as we understand the law, an executor who files a bill in his representative capacity is a party thereto in his individual capacity, if as an individual he has a manifest interest in the subject matter of the bill. Thus an executor being a legatee to the extent of the net income of the whole estate during his life, and to the extent of one-fourth of the general residuum, having filed a bill, as executor, to restrain some of his creditors from proceeding to subject his interest by levy and sale at law, to which bill creditors of the estate as well as some of his own creditors are parties defendant, and praying for a decree directing him, in view of the conflicting claims of the defendant, how to administer the estate of his testatrix, and that the defendants establish their priorities, and show to what extent they can legally subject assets of the estate to the payment of their claims, is a party complainant, not only as executor, but likewise as legatee and debtor. Can it be supposed that the decree on such a bill would not bind him individually in respect to his legacies, or that as an individual he would not be entitled to take the benefit of the decree, in so far as it might redound to his individual interest touching those legacies? Moreover, is it not as much for the protection of the executor as for the advantage of the estate, and often more so, that a Court of Equity interposes to give direction? Whoever heard that an executor has to make himself a party to his own bill, in order to bind himself individually, or to give himself, as a creditor, legatee or otherwise, the fruits of the decree to the extent of his personal interest in the same. Is it possible to doubt that on the present bill it would be competent to decree the proper disposition to be made of the legacies, whether to pay them out of the claims of creditors, or to hold them free from such claims? And how could the executor as an individual, either share the burden or be shorn of the benefit of any rightful share on that subject, that might be rendered? Unless we are wholly unfit to be judges on such a question, we are at a loss to understand why it should be considered a question at all. That no direct authority upon it has been produced, must be due alone to the fact that legal evolution has not

progressed far enough to develop a needless precedent for a necessary conclusion."

The following cases are also authority upon the same subject:

Donifelser vs. *Heyl*, 52 Pacific Reporter, page 468.

Colton vs. *Onderdonk*, 69 California, 155, and 10 Pacific Reporter, 395.

Stewart vs. *Montgomery*, 23 Pa. St. Report, 410.

Small vs. *Flint*, 10 Mass., 128.

Kerrison vs. *Stewart*, 93 U. S., 155.

Corcoran vs. *Chesapeake and Ohio Canal Co.*, 94 U. S., 741.

In this last case it is said: "It is also argued that in that suit Corcoran was only a party in his representative capacity of trustee, and he here sues in his individual character as owner of the bonds and coupons, and in this latter capacity is not bound by that decree. But why is he not bound? It was his duty as trustee to represent and protect the holders of these bonds; and for that reason he was made a party, and he faithfully discharged that duty. It would be a new and very dangerous doctrine in the equity practice to hold that the *cestui que trust* is not bound by the decree against his trustee in the very matter of the trust for which he was appointed. If Corcoran owned any of these bonds and coupons, he is bound, because he was representing himself. If he has bought them since, he is bound as privy to the person who was represented. *Kerrison, assignee*, vs. *Stewart*, 93 U. S., 155, and the authorities there cited."

This being the law of the case, the parties to the two suits in South Carolina and Connecticut were the same. H. P. Clarke, as executor and trustee, brought the suit in South Carolina, and as executor he represented his own personal inetrest, as beneficiary under said will, and as heir at law of Julia Clarke's share of Julia H. Clarke's estate, and is, therefore, bound in all Courts of the United States by the judgment rendered in that case, when again questioned by the same parties.

In the Connecticut case, he was before the Courts as administrator, and as heir at law of Julia Clarke's estate, and at the same time he was executor of Julia H. Clarke's will and estate, the trustee of the shares of his infant daughters, Nancy B. Clarke and Julia Clarke, all of which appears from the transcript of record, pages 13 to 17, folios 28 to 33.

In his appearance in the case of the Probate Court of Bridgeport, Conn., as an individual, he set up the judgment and proceedings in the South Carolina Courts, in which he appears as executor and trustee, in evidence as *record evidence*, and conclusive of his own rights as an individual and those of his daughter. He here recognizes the fact that he is bound by that judgment, and avails himself of one of the ways directed by law of establishing his rights adjudicated by that judgment, to wit: placing it in evidence as *record evidence* of those rights. He could have set up

the judgment in his answer, but placing it in evidence was as effectual as if he had pleaded it in his answer; and it appearing thus in evidence, the Probate Court was bound to give it full faith and credit, and in not doing so, he has violated the fundamental law of the United States, which requires full faith and credit to be given such judgments.

2d. Was the subject matter of the two suits the same, and did the South Carolina Courts have jurisdiction of the parties and subject matter of the suit brought there, for the construction and interpretation of Mrs. Julia H. Clarke's will?

Judge Baldwin, of the Supreme Court of Errors of Connecticut, in his decree in the case, page 19, transcript of record, says: "This will (that of Mrs. Julia H. Clarke) was admitted to probate in the proper Courts of that State (South Carolina), and a suit for its construction afterwards brought there before a Court of Equity having jurisdiction of the parties and the subject matter, which resulted in the decree to the effect that it worked an equitable conversion of all the real estate of the testatrix wherever situated. If this be the construction of the will, the decree of the Court of Probate for the District of Bridgeport, from which the present appeal is taken, is erroneous."

He here concedes that the Courts of South Carolina had jurisdiction of the subject matter of that suit, but contends that the parties to the Bridgeport, Connecticut, suit were not the same as those to the South Carolina suit, and that the subject matter of the Connecticut case was not the same as that of the South Carolina case. The only question which the South Carolina suit adjudicated was whether or not there was an equitable conversion of Mrs. Clarke's real estate, by her will, at the time of her death into personalty. This was the sole question considered by that Court, and the sole question decided by it. H. P. Clarke's complaint was framed and all the pleadings made to fix the determination of that question.

The petition, evidence and proceedings of the administrator, H. P. Clarke, in the Probate Court of Bridgeport, proceeded upon the assumption that the estate of Julia Clarke, which was an undivided third interest in Julia H. Clarke's estate, coming to her under the will of her mother, Julia H. Clarke, was personalty, as had been determined and adjudged by the South Carolina decree. Julia Clarke, the infant, owed no debts, and there was no use for an administrator, except for transmitting the fund to the South Carolina jurisdiction for settlement in the proper Courts of that State.

The whole contention, then, in the Probate Court of Bridgeport, was whether that estate was personalty, and whether the will of Mrs. Julia H. Clarke had made it personalty. This question had to be determined before the question to whom it should be distributed could be decided. If that estate was personalty, then,

as Judge Baldwin says, the decree of the Probate Court was erroneous. In the Judge of Probate's decision, he says that an exemplified copy of Mrs. Clarke's will and "the decision of the Supreme Court of South Carolina interpreting the same, in a case in which the petitioner herein was plaintiff, and Nancy B. Clarke was defendant, is on file in this office, and is hereby referred to." And then he adds: "Wherefore, this Court finds and decrees that the sole heir and distributee of the intestate is her aforesaid sister, Nancy B. Clarke." How could the Probate Court have reached this decision, except it had held that the estate of Julia Clarke, under her mother's will, was real estate and not personalty; and, therefore, Julia Clarke's only heir was her sister, Nancy B. Clarke, to whom her estate descended, under the statute law of Connecticut. If that estate was personal property, it was governed by the law of the domicil of the intestate, South Carolina, and distributable according to the statute law of that State; in which case Henry P. Clarke and Nancy B. Clarke were the heirs at law. The sole question, therefore, which that Court determined, in reaching the conclusion that Nancy B. Clarke was the sole heir at law of Julia Clarke, was that Julia's estate was not personalty, but realty. Was it real or personal property, was the question decided. This was the precise question in South Carolina—was Julia Clarke's estate, consisting solely of an undivided one-third interest in her mother's estate, personalty or realty? That question was before the South Carolina Court in the construction of Mrs. Clarke's will, and was the same that the Probate Court passed upon in reaching its conclusion. Again, the issues raised by the reply to the reasons of appeal, page 13 of the transcript of record, is as to whether Julia Clarke's estate is personal or real estate. Paragraph one of the first reason of appeal is as follows: "1. The estate of the intestate in the State of Connecticut consisted of property, all of which is for the purpose of distribution, and for the purpose of the ascertainment of heirs and distributees, personal estate." And paragraph one of the second reason of appeal is: "1. The Court erred in assuming to ascertain the heirs and distributees of the intestate, as all of the estate of the intestate, for the purpose of the hearing them before the Court, consisted of personal property, and the Courts of South Carolina alone had jurisdiction to fix and ascertain the heirs and distributees."

The reply of the defendant, Nancy B. Clarke, to these reasons of appeal denies the above. The issue thus raised was as to whether Julia Clarke's estate was personalty or not. Again, the questions of law which arise upon the findings of fact by the Superior Court is the same which was raised by the reasons of appeal of H. P. Clarke, and the reply thereto by Nancy B. Clarke.

Again, the Supreme Court of Errors of Connecticut, after holding that the parties and subject matter of the two suits were not the same, proceeds to pass upon the question of the character of

Mrs. Clarke's estate, and holds that said will did not work an equitable conversion of all the real estate into personalty, and for this reason, and this alone, affirms the decree of the Probate Court. Judge Baldwin, page 22, folio 43, of transcript of record, says the decree of that Court (meaning the Probate Court of Bridgeport), from which this appeal is taken, treated the real estate in this State left by Julia Clarke as being real estate, to all intents and purposes. If, in truth, it had become before her death the subject of an equitable conversion, this decree must be reversed, and the reasons of appeal have brought this point directly before the Superior Court for decision. If the question of equitable conversion is taken out of the decree of the Probate Court, the findings of fact and reservation of the Superior Court, and the decree of the Supreme Court of Errors of the State of Connecticut, then the whole proceeding becomes a lifeless skeleton, without nerve and sinew, without flesh and blood, and there was no subject matter considered by that Court.

He then proceeds to discuss the question of equitable conversion, because it was raised by the reasons of appeal from the Probate Court to the Superior Court, which Court, in its finding of fact and reservation, submitted this question *as the question* upon which the judgment of the Supreme Court was asked. This question was thus, not only the sole question before the Probate Court and Superior Court, but the main question before the Supreme Court of Errors. Judge Perry, guardian *ad litem* and attorney for the infant defendant, Nancy B. Clarke, says in his argument before the Court: "The only question in this case is whether certain estate of Julia Clarke, situated in Connecticut, is, for the purpose of distribution, real estate or personal property." If this is true, how could the subject matter of the two suits be different? They were concerned about the same matter.

It is contended, however, that the South Carolina Court had no power or jurisdiction to determine the question submitted to it, so as to affect Connecticut lands, and, therefore, the judgment was not binding on Nancy B. Clarke or H. P. Clarke.

It must be borne in mind, in the discussion of this question, that Mrs. Julia H. Clarke's will was executed according to the forms of law prescribed by the State of Connecticut for the execution of wills. Her will was properly executed, and being such, regulated the disposition of her estate, and that will becomes the law of this case.

The question of construction of the will is an entirely different one from that of its execution. If it had not been executed according to the forms of law prescribed by the State of Connecticut in the disposition of property, then the question might properly arise as to whether the *lex rei sitæ* did not govern in the disposition of real estate. But that question does not here arise. The will has all the requisites as to form and execution prescribed

by the laws of Connecticut, and the only question that the South Carolina Court undertook to decide was what did the will mean, what was its proper construction, and what power and authority did it give the executor.

The will being the will of a South Carolinian, and all the beneficiaries under the residuary clause being domiciled in that State, we submit that the Courts of that State, which assumed jurisdiction, had jurisdiction of the parties, and the question as to meaning of that will, although it indirectly affected lands outside of that State.

In *Massie* vs. *Watts*, 6th Cranch, page 160, Chief Justice Marshall uses the following language: "Upon the authority of these cases, and others, which are found in the book, as well as upon general principles, this Court is of opinion, that in a case of fraud, of trusts or of contract, the jurisdiction of a Court of Equity is sustainable wherever the persons be found, although land not within the jurisdiction be affected by the decree." He also says, in the same case: "The strict primary decree of a Court of Equity is *in personam*, and may be enforced in all cases where the person is within its jurisdiction."

In *Earle of Kildare* vs. *Sir Morrice Eustace and Fitzgerald*, 1 Vernon, 419, it was determined that if the trustee live in England, the Chancellor may enforce the trust, although lands lie in Ireland.

In *Toller* vs. *Carteret*, 2 Vern., 494, a bill was sustained for the foreclosure of a mortgage of lands lying out of the jurisdiction of the Court, the person of the mortgagor being within it.

In the case of *Penn* vs. *Lord Baltimore*, 1 Vez., page 444, Lord Chancellor Hardwicke held that a contract relating to lands lying in Pennsylvania and Maryland, could be construed by the Chancery Courts in England, because it had jurisdiction of the parties, both resident and citizen of England, and the subject matter, to wit: The construction of English contract relating to Maryland and Pennsylvania lands, and could, therefore, reach the persons of the parties, and being a judgment *in personam*, was binding upon them, though that which it effected was in another territory.

In the case of *Burnley* vs. *Stevenson*, 24 Ohio St. Reports, page 474, the rule is laid down, that the decree was *in personam*, and bound the consciences of those against whom it was rendered. In it the contract of their ancestors to make the conveyance was merged. The fact that the title which had descended to them for Evans was thus established by the decree of a Court of competent jurisdiction. Such a decree is *record evidence* of that fact, and also of the fact that it became and was their duty to convey to him the legal title. In this case a decree of a sister State had held that, under a contract of the ancestor of one of the parties, it had been stipulated that the ancestor would convey certain lands in another State to one Evans. This Court having

jurisdiction of the parties, held that the parties to whom the legal title had descended were bound, under that contract, which they found to be good, to convey to Evans the lands which their ancestor had contracted to sell to him, and so decreed, although the lands were in the State of Ohio, and beyond the jurisdiction of the State where the contract was made and the parties resided and had their domicil.

Again, it has been held that a suit for specific performance of a contract for the conveyance of lands proceeds *in personam*, and may be maintained in any Court of Equity which has jurisdiction of the parties, even if the land lies in another State or foreign country. *Brown* vs. *Desmond*, 100 Mass., page 269.

In the case of *Ford* vs. *Ford*, 70 Wisconsin, page 19, it is laid down that the *validity* of a will of real estate must be governed by the law of the place where the land is situated, and that the *validity* of a will of personalty must be governed by the law of the testator's domicil, and that the law of the domicil governs in the *interpretation* of wills. Story on Conflict of Laws, sec. 479a and 479c; *Van Steenwyck* vs. *Washburn*, 59 Wis., 510. In the words of Mr. Justice Story: "The language of wills is not of universal interpretation, having the same precise import in all countries and under all circumstances. They are supposed to speak the sense of the testator according to the received laws and usages of the country where he is domiciled, by a sort of tacit reference, unless there is something in the language which repels or contradicts such a conclusion." *Harrison* vs. *Nixon*, 9 Pet., 404; *Trotter* vs. *Trotter*, 4 Bligh (U. S.), 502; *Chamberlain* vs. *Napier*, L. R., 15 Ch. Div., 614.

In *Caruthers and wife* vs. *Corbin, ex'ors, and others*, 38 Ga., page 86, it is said: "We fully recognize the rule here contended for, that this Court will not enforce the laws of another State which contravene the policy of our laws; but this case does not fall within this rule. Here a will was made in South Carolina, which according to the decision of the highest tribunal known to the laws of that State, confirmed certain rights on certain parties, irrespective of the provisions which, in our Courts, would render the will illegal. We are not called upon to enforce any illegal provisions of the will. The question of emancipation is not in any way before us. Here is a judgment of our sister State by a Court having jurisdiction of the parties and the subject matter, and the question is shall the judgment of that Court be respected by our Courts? Shall we mete to the parties the rights which, according to the decision of the Courts of our sister State, they have been decided to be entitled to? Were we called upon to enforce the illegal provisions of this will, the other questions might arise. But such is not the case. The simple question is whether the judgment of that Court shall be respected? If that judgment is to be respected, what is the effect? The property of John J. Salloy *was*

by a Court of competent jurisdiction decided under his will; and that judgment must conclude the rights of the parties."

In *Stoff* vs. *McGinn*, 178 Ill., 46, it is held that parties to a decree construing a will, rendered by a Court having jurisdiction of the parties and subject matter, which decree finds that real estate is to be regarded as personal property and directs the appointment of a trustee to sell and distribute, cannot while the decree remains in force, though unexecuted, have partition or recover the property as real estate, in any form of action."

Also that "Courts of Equity are authorized by law to construe wills in proper cases, and upon filing of the bill of complaint, the question of proper construction of the will was brought within the jurisdiction of the Court. If it could be said that the Court was mistaken in the conclusion that the will required the construction, and the appointment of a trustee, it would be merely erroneous. The decree could only be attacked for want of jurisdiction in the Court to adjudicate on the subject at all or to bind the persons of the parties, and the Court had in this case no right to overturn the construction there given in that case.

In *Brown* vs. *Brown*, 7 Southwestern Reporter, page 648, the Court uses this language, after discussing judgments *in rem* and *in personam*: "If in the last analysis, when, on the one hand, we compare probate cases with other litigations over the succession of personal and real property, and attempt to draw a clear distinction; and if, on the other hand, when we contrast those cases with proceedings purely *in rem*, we find the term, 'subject matter,' somewhat elusive, and difficult to reduce into legal harmony with the very material *res* involved in pure proceedings *in rem* on a ship, or a hundred bags of coffee—it must be remembered that the necessity arising from conflicts of jurisdiction over the successions to deceased persons' estates in different States, which have often been of the most perplexing and distressing character, and induced an appropriation of the principles governing proceedings *in rem*, rather than any perception of an absolute oneness of essence in the two classes of questions, and that they, indeed, that they both, spring out of common necessity and grow from the same root—the need in general to prevent conflicts over questions that in their nature cannot be confined to any one jurisdiction, or any one system of jurisprudence. But it would not be profitable to pursue this discussion further. Enough has been said to show that there is really no such common ground between probate cases and the case at bar as to require the extension to this case of the principles governing those. The analogy between the two classes of cases is accidental, not vital. Indeed, the Court may as well be asked to extend those cases to every contest over the title or succession to property, even when the contest is over the construction of a deed, or the terms of a verbal contract. This case thus holds that the actions for construction of wills are proceedings *in per-*

sonam and not *in rem*, and where Courts have jurisdiction of the persons interested therein, they may proceed to construe wills, and their judgments are binding between the parties everywhere.

This doctrine is also laid down as law in text books. In Black on Judgments, section 922, it is stated that Courts are bound to respect a decree of another State enforcing provisions of a will, even though such provisions would be contrary to the policy of their own laws.

In Black on Judgments, section 850, is found also the rule, that a judgment of a competent Court in a sister State is conclusive on the merits, extends equally to decrees in Chancery.

Thus, where a Court of Equity of another State, having jurisdiction of the parties, has made a decree declaring a certain judgment to be void for fraud and enjoining the execution of it, such decree is binding and conclusive on the parties in every other State; not indeed as being an injunction (for in that aspect it could have no territorial effect, nor affect Courts out of their jurisdiction), but as being the regular judgment of a Court of a sister State, and, therefore, entitled to full faith and credit in all Courts.

Again, section 808, we have already seen that decrees of probate, or decrees made in the granting of letters of administration, are considered as being *in rem*, and as conclusive upon all persons. So a suit to test the validity of a will is a proceeding *in rem*, and binding upon all parties in interest, whether parties to the issue or not. On the other hand, it has been decided that a suit for the construction of a testamentary writing is not in the nature of a proceeding *in rem*.

Again, Freeman on Judgments, section 608, states that actions or proceedings to set aside wills, or test their validity, are also generally proceedings *in rem*, while suits for their construction are *in personam*. See, also, *Brown* vs. *Brown*, 86 Tenn., 277; and *Freeman* vs. *Alderson*, 119 U. S., 187.

Herman on Estoppel and Res Judicata, vol. 1, page 617, and authorities there cited, says: "A decree by a Court of Equity in one State, directing a conveyance of land situate in another State, may be pleaded as a cause of action or as a defense in the Courts of the State where the land lies, although no conveyance has been executed; and unless impeached for fraud, is entitled in the Court where so pleaded to the force and effect of record evidence of the equities therein determined."

The cases and text books here cited show that, in cases where wills containing trusts are to be interpreted, in cases of contracts which are to be established and enforced, and in cases where frauds are to be prevented, Courts of Equity have jurisdiction wherever the persons interested in and effected thereby reside and are domiciled. They hold that such actions are *in personam*, and in the language of Chief Justice Marshall, "the strict primary decree of

a Court of Equity is *in personam*, and may be enforced in all cases where the persons are within the jurisdiction of the Court."

In the case at bar, part of the real estate of Mrs. Julia H. Clarke which was disposed of under her will, was located in South Carolina, all of the parties thereto were citizens of and domiciled in South Carolina, the will of Mrs. Clarke was probated there and was a valid will under the laws of South Carolina, as well as those of Connecticut, and the Court of Common Pleas for Richland County, in said State, was a Court of general equity jurisdiction, and had jurisdiction, therefore, of the parties and subject matter of said case, and the power to decree an interpretation and construction of said will, and such construction is binding upon said parties whenever and wherever said will is again brought in question upon the same point and between the same parties.

Not only have Courts of Equity of the domicil of parties the power to enforce contracts, to prevent frauds and construe wills which may effect real estate beyond their jurisdiction, but such decrees have been almost universally followed and respected by other Courts, where the questions therein determined have again arisen between the same parties.

I hereto attach some of the cases which are similar to the case now under consideration, and which show how careful the Courts of sister States have been to give full faith and credit to the decrees of the Courts of other States where such questions as these have arisen.

Indeed, it seems to me that the framers of our Constitution must have had just such cases in view when the article which requires full faith and credit to be given to judicial decisions of the States was framed. To do otherwise would work the utmost confusion, and entail a variety of construction and interpretation which would prevent an executor or trustee from administering the estate in his hands as a unit under the directions of one Court and one authority.

The following cases are in point and show how such questions have been acted upon by Courts of the several States:

Frances A. Burnley vs. *Edward O. Stevenson*, 24 O. St. Rep., 477:

STATEMENT OF FACTS.—The original action was brought in the Court of Common Pleas of Packaway County, by the plaintiffs in error, to recover from the defendants in error the possession of two undivided third parts of 606 acres of land, situate in said county, and being part of original survey No. 6943, in the Virginia military district. The plaintiffs sought to recover in the right of the heirs of Gen. Charles Scott, to whom the land described in this survey had been conveyed by the United States by patent, in the year 1812.

The defendant, by way of his defense, set up in his answer the following state of facts, to wit: That previous to the date of said

patent, Gen. Charles Scott, having received a warrant for 1,666 2-3 acres of land, for military services rendered by him in the Virginia line in the continental establishment, and employed one John Evans, a surveyor, to locate, survey and obtain patents for him, on said warrant on lands in the Virginia military district, and in consideration of the services of Evans in the premises, had agreed to convey to him one-fifth part of all lands so to be located, surveyed and patented; that Evans duly performed said services; that the lands embraced in survey 6,943, were part of the lands located, surveyed and patented to Gen. Scott under said warrant; that it was further agreed between Scott and Evans, that the share of Evans under the contract should be selected from lands in said survey; that soon after issuing the patents to Scott, he died, without having conveyed to Evans the lands to which he was entitled under said contract.

That afterwards Evans filed his bill in chancery, in the Circuit Court of Fayette County, Kentucky, against the heirs and legal representatives of said Scott (being the same persons under whom the plaintiffs claim title) to compel the specific performance of the contract, by a conveyance to him of the lands to which he was entitled thereunder; that said Court obtained jurisdiction of the persons of all the heirs, by service of process, and by voluntary attendance; that upon the final hearing of said case upon the bill, answers and exhibits, to wit: on the second day of February, 1816, the Court found the equity of the case in favor of Evans, and directed the defendants therein to convey to him the lands described in the petition of the plaintiffs below; that it was further decreed by said Court that in default of such conveyance by the defendants, one Robert Scott, a master commissioner of said Court, should make such conveyance; that said master executed and delivered to said Evans a deed in fee simple for said lands, on the 28th of May, 1817.

The defendant in his answer further sets forth, that he has succeeded to all the rights and title of John Evans in and to said lands, and avers that he and those under whom he claims, are now lawfully in possession thereof, and have so been in possession, claiming under said decree and deed from said master, ever since the date thereof.

To this defense the plaintiffs below filed their reply, to which the defendant demurred. The demurrer was sustained, to which ruling the plaintiffs excepted.

Judgment was, therefore, rendered in favor of the defendant below, and on error affirmed by the District Court. To reverse these judgments, this proceeding is now instituted.

For the motion:

"We think the issue is reduced to the single question: Can the decree of a Court of general jurisdiction, if you please, of a sister State, and a deed of a commissioner of said Court, made in pur-

suance of such decree, divest the title of the defendants in such decree, to land in the State of Ohio?"

By the Court:

That Courts having chancery powers in one State have jurisdiction to enforce a trust and to compel the specific performance of a contract in relation to lands situate in another State, after having obtained jurisdiction of the persons of those upon the obligation rests, is a doctrine fully settled by many cases. *Penn* vs. *Lord Baltimore*, Ves., 444; *Massie* vs. *Watts*, 6 Cranch, 148; *Penn.* vs. *Hayward*, 14 Ohio St., 302; and cases cited.

It does not follow, however, that a Court having power to compel the parties before it to convey lands situate in another State may make its own decree operate as such a conveyance. Indeed, it is well settled that a decree of such a Court cannot operate to transfer lands situated in a foreign jurisdiction. And this, for the reason that a judgment, or decree *in rem*, cannot operate beyond the limits of the jurisdiction or State wherein it is rendered. And if a decree in such case cannot effect the transfer of the title of such lands, it is clear that a deed executed by a master, under the direction of the Court, can have no greater effect.

The next inquiry, then, is as to the force and effect of the decree rendered by the Circuit Court, directing the heirs of Gen. Scott to convey the lands in Ohio to Evans. This decree was *in personam*, and bound the consciences of those against whom it was rendered. In it, the contract of their ancestor to make the conveyance was merged. The fact that the title which had descended to them was held by them in trust for Evans, was thus established by the decree of a Court of competent jurisdiction. Such decree is record evidence of that fact, and also of the fact that it became and was their duty to convey the legal title to him. The performance of that duty might have been enforced against them in that Court by attachment as for contempt, and the fact that the conveyance was not made in pursuance of the order, does not affect the validity of the decree in so far as it determined the equitable rights of the parties in the land in controversy. In our judgment, the parties and those holding under them with notice, are still bound thereby.

In the case of *Ford* vs. *Ford*, 80 Mich., the contest arose over the construction of a Wisconsin will made by a citizen of Wisconsin, whose domicil was Dane County, of that State. The testator owned lands in Michigan, and the executors had previously brought an action in the proper Courts of Wisconsin (70 Wisconsin, page 19), in which it was held that the will of the testator worked an equitable conversion of the realty of the testator into personalty. The Michigan Court, page 49, 80 Michigan, says, the Court of Wisconsin acted upon the assumption that it was the duty of that Court to absolutely construe the will of the testator, he being domiciled in Wisconsin, not only as to real and personal

estate situate in Wisconsin, but also as to the realty wherever situated, so far as to ascertain the true intent and meaning of the testator in making disposition of his whole estate, although holding that the *validity* of the provisions with reference to lands in other jurisdictions must be determined by Courts sitting within those jurisdictions. The Court then asks, are we then to take the will in this State under this ancillary proceeding and construe it as to the true intent and meaning of the testator as an original question, and without reference to the decision of the domiciliary Court, or must we be guided by the construction as to the meaning of the testator by the interpretation given it by that Court?

In our view of the case, the question does not become of much importance, but we think the law well settled, that the meaning and intent of the testator having been settled by the domiciliary Court, the Courts in foreign States and countries will be guided by such construction, unless it can be clearly gathered from the terms used in the will, that the testator had in mind the law of the place of the situs, or used language necessarily referring to the usages, and appropriate only to the situs.

This seems to be the settled rule in England, as well as in this country. *Trotter* vs. *Trotter*, 4 Bligh (N. S.), 502. Story on Conflict of Laws, 479a, says as to wills: "The general rule of the common law is that it is to be construed according to the laws of the place of his domicile in which it is made."

In *Washburn* vs. *Van Steenwyk*, 32 Minn., page 336, a testator owning real property in Wisconsin and in Minnesota, died in the former State, that being his domicil as well as that of his widow. The widow was insane. Administration was had upon the will in Wisconsin, and also in Minnesota, in respect to property in the latter State. An action was commenced in Wisconsin, in which all persons interested in the will were made parties, for the purpose of obtaining a judicial construction of the will, and, if it should be considered to present a case for election on the part of the widow, as between certain bequests made by the will in her behalf and her legal rights in the property of the testator, that an election might be made in her behalf. In that action it was finally determined that the will expressed the intention of the testator that the bequest in favor of the widow should be in lieu of her legal right in the testator's property, and not in addition thereto; that it presented a case for an election; and the Court of Wisconsin, acting in behalf of its insane ward, elected in her behalf to take under the will. The Court of Minnesota held that such determination as to the construction of the will was conclusive between the parties.

In the course of administration with respect to lands in Minnesota, the Probate Court there, in a proceeding by the guardian of Mrs. Washburn, made an election in behalf of the insane widow to take against the will. The adjudication involving this election

was prior to the final election made in Wisconsin. But an appeal upon questions of law and of fact was taken from the judgment of the Probate Court to the District Court, which appeal had the effect, under the Minnesota statutes, to transfer the cause to the District Court for trial *de novo*. Pending this appeal and before the new trial, final judgment was rendered and election made for the widow in Wisconsin, as above stated. On this state of facts the Minnesota Court held: 1. The Wisconsin Court had jurisdiction to make such election. 2. The election finally made and declared by the Wisconsin Court was effectual everywhere, as the election of the widow to take under the will, and precluded a different choice being made in respect to lands in Minnesota.

Judge Dickinson, in delivering the opinion of the Court in this case, says, that the Wisconsin Court had jurisdiction to entertain the question of the construction to be put upon the will, and to adjudicate thereon, is apparent, and need not be discussed. It is equally apparent that that adjudication was final, and concluded the parties to that controversy, which embraced all the parties interested. Neither this appellant nor these respondents would have been heard in that State to question the correctness of the construction of the will thus judicially declared. We feel no doubt that the same conclusive effect should be attributed to that judgment here and in this case, which involves the same questions, and is between the same parties. The adjudication was neither beyond the jurisdiction of the foreign Court, nor did it interfere with our State sovereignty. The disposition of the lands in this State, and in the course of administration here, is effected, not by the force of the decree of the foreign Court, but by force of our own laws and by the decrees of our own Courts. Our laws recognize a final adjudication upon the merits and between the proper parties, delivering the true import of such an instrument as concluding the parties to the controversy, whether that adjudication was in a domestic tribunal of competent jurisdiction, or in the tribunal of another State having jurisdiction. In giving effect to such an adjudication, we are enforcing our own laws and not the laws of another State. See, also *Cone* vs. *Hooper*, 18 Minn., page 536.

Crusoe vs. *Butler*, 36 Miss., 150. "This case involved the question as to the force and effect of a will of a testator domiciled in Alabama as to realty situated in Mississippi passing thereunder. Opinion: But it is again objected that the power to convey land was given by the will to the two executors, and being a matter resting in the discretion of both of them, that it required the joint deed of both of the executors to make a valid conveyance, and therefore, that the deed of Benjamin Leavens as sole executor is insufficient. It is above seen that the power to sell was not strictly executorial in its character, but a trust independent of the proper duties of the executor. It arose from a will executed by

a testator domiciled and who died in Alabama, and which was admitted to probate there. The nature, obligations and interpretations of the instrument and the rights and powers arising under it, must be determined by the law of that State. Story Conflict of Laws, sec. 262, 490, 479a, 479b, 479n."

"And it has been decided by the Supreme Court of that State in a suit involving the will, and between Leavens, the executor, and the plaintiff in this action, that the power granted might be exercised by the executor who qualified; and that it did not require the co-operation of both the individuals named as executors in the will * * * This must be taken as decisive of the point, however different it may be from the rule which this Court has held upon the same questions, and in a case governed by our laws." In *Guerard* vs. *Guerard*, 73 Ga., 506, the will devised all the property of the testator, both real and personal, including a lot in Georgia, to his wife for life, with remainder to the issue of the marriage living at her death, and default of such issue, to "his own right heirs," and when the wife of the testator died without issue and the property was claimed by the descendants of a brother of testator of the whole blood, and also by his brothers and sisters of the half blood, on the paternal side, it was admissible to prove that the testator was living in the State of Pennsylvania up to the date of his death, and when the will was made; that the property in Georgia was derived from his mother; that the testator had real and personal property in Pennsylvania, and that by the law of that State, at the time the will was made, the brothers and sisters of the whole blood would inherit in preference to the brothers and sisters of the half blood. Such evidence tended to show the intention of the testator and his meaning in using the words his "own right heirs."

Under these facts the descendants of the testator's brothers of the whole blood would take land in Georgia to the exclusion of the brothers and sisters of the half blood. The law of the domicil governs in the interpretation of the will of the testator. Here the words "own right heirs," were held to mean brothers of the whole blood, because used in reference to the law of his domicil, which gave to the brother of the whole blood in preference to the brother and sisters of the half blood.

See, also, *Donnelli* vs. *Donnelli*, 4 Bush Ky., 51.

Dammert vs. *Osborn*, 140 N. Y., 30.

In the case of *Harrison and others* vs *Nixon*, 9th Peters, page 502, Mr. Justice Story says: "The present is a case of a will; and so far as the matter of the bill is concerned, is exclusively confined to personalty bequeathed by that will. And the Court are called upon to give a construction to the terms of that will; and in an especial manner to ascertain who is meant by the words heir at law in the leading bequest in the will. The language of wills is not universal interpretation, having the same precise import in all countries and under all circumstances. They are supposed to

speak the sense of the testator, according to the received laws or usages of the country where he is domiciled, by a sort of tacit reference; unless there is something in the language which repels or controls such a conclusion."

In regard to personalty in an especial manner, the law of the place of the testaor's domicil governs in the distribution thereof, and will govern in the interpretation of wills thereof, unless it is manifest that the testator had the laws of some other country in view.

This language is used by Judge Story in this case, and he also holds in the case that it was necessary in the interpretation of wills to know the domicil of the testator, and that wills are interpreted with reference to the laws and usages of the domicil, and this case was remanded to the lower Courts in order that the proper averments might be made in the bill and proper proof taken of the domicil of the testator, because no just interpretation could be given of the will without this knowledge.

I have thus shown that the parties to the actions in South Carolina and Connecticut were the same, that the subject matter was the same, that the South Carolina Courts had jurisdiction of the parties and subject matter of the action there, that the Courts of the several States of the Union where similar questions and cases have arisen have uniformly given full faith and credit to decrees and judgments of sister States interpreting wills, although they affect lands beyond their borders, the case at bar being the single exception, so far as my investigation goes.

The Supreme Court of Errors of the State of Connecticut has thus failed to give full faith and credit to a decree of its sister State in actions between the same parties and upon the same subject matter. The Constitution of the United States requires full faith and credit to be given to the judicial decisions in the several States of the Union by the Courts of the States when called in question by the same parties or privies in those Courts. The State of Connecticut has not given full faith and credit to the decree of the South Carolina Court in its interpretation of Mrs. Clarke's will. South Carolina was Mrs. Clarke's domicil, there the beneficiaries under her will resided, the Courts of that State had jurisdiction to interpret that will, and having done so, its decree is final and conclusive between the parties thereto, and the Courts of Connecticut erred in not giving that decree full faith and credit.

In Black on Judgments, par. 859, it is said: The Constitution requires that full faith and credit shall be given in each State to the records and judicial proceedings of every other State. Under this language, the status of a judgment rendered in one State and carried into another is peculiar. It is not in all respects a foreign judgment. For, as a matter of evidence and pleading, it is regarded as a record, and conclusive. But neither is it in all respects a domestic judgment. For it is not a proper foundation

for final process in the latter State, and, besides, it may there be impeached for want of jurisdiction. The true doctrine is that such a judgment is to receive in all Courts the same faith, credit and respect *that* is accorded to it *at home*.

See 116 U. S., *Renaud* vs. *Abbott*, 277.

In South Carolina, as we have shown, Mr. Clarke, as an individual, is ~~barred~~ bound by the South Carolina decree, and could not there question it again, as the Supreme Court of Errors of Connecticutt has held he might do, as an individual. He is ~~barred~~ bound by that decree in every relation that he bears to the estates of Julia H. Clarke, Julia Clarke and Nancy B. Clarke.

The Courts of Connecticut have erred in not holding Nancy B. Clarke bound by the South Carolina decree, because Henry P. Clarke is thereby estopped as an individual from ever questioning that decree in any of the Courts of the United States, and the Courts of Connecticut in not so holding have not given full faith and credit to the judicial decisions of her sister State South Carolina.

The following is the full record of the South Carolina case, and which I append as a part of this brief:

LeRoy F. Youmans

John S. Verner.

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IE STATE OF SOUTH CAROLINA.

IN THE SUPREME COURT.

NOVEMBER TERM, 1895.

FIFTH CIRCUIT—RICHLAND COUNTY.

RY P. CLARKE, as Executor of the Last Will and Testa-ent of Julia H. Clarke, and Trustee of the Estate of Nancy . Clarke, His Infant Daughter, Under Said Will, Plaintiff, espondent,

against

NANCY B. CLARKE, Defendant, Appellant.

F. H. WESTON,
BACHMAN & YOUMANS,
Respondent's Attorneys.
WM. H. LYLES,
Appellant's Attorney.

Case for Appeal.

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above entitled action was duly commenced by the service mmons and complaint on the defendant on the — day of 895.

following is a copy of the

COMPLAINT.

plaintiff above named, complaining of the defendant above alleges:

First.

on the 10th day of February, 1894, Julia H. Clarke, the the plaintiff, departed this life at her home in Waverly, a of the city of Columbia, in the county and State aforesaid, of force her last will and testament, dated May 25th, 1891,

and a codicil thereto dated November 11th, 1893, wherein and whereby she appointed the plaintiff executor thereof, which will and codicil were duly admitted to probate by the Probate Court of said Richland County, in said State, on the 14th day of February, 1894, and on the same day letters testamentary were duly issued thereon by said Court to the plaintiff, who duly qualified and entered on his duties as such executor, and is now the executor of said last will and testament.

Second.

That the following is a copy of said will and codicil:

"I, Julia H. Clarke, wife of Henry P. Clarke, residing near Eastover, in Richland County, State of South Carolina, being of sound and disposing mind and memory, do make and ordain this my last will and testament and hereby revoke all other wills by me at any time heretofore made.

"First. I direct that all my just debts and my funeral expenses shall be fully paid by my executor hereinafter named.

"Second. I direct that a portion of my estate, sufficient to produce one thousand dollars ($1,000.00) annually, shall be safely invested by my executor, and the said one thousand dollars be paid annually to my father, S. H. Hurd, now of New York city, in quarterly payments, during the term of his natural life.

"Third. I give and bequeath to Mrs. Laura Sherwood, of Bridgeport, Conn., the sum of ten thousand dollars ($10,000.00).

"Fourth. I give and bequeath to Miss Agnes C. Patterson, of said Bridgeport, the sum of five thousand dollars ($5,000.00).

"Fifth. The rest, residue and remainder of my estate, real and personal, of whatsoever description and wheresoever situated, I give, devise and bequeath as follows: One-half thereof to my husband, Henry P. Clarke, and one-half thereof to my said husband in trust for my daughter Nancy (until she becomes twenty-five years of age, and then to pay the whole sum over to her, but if she shall marry before that age with the consent and approval of her father, or in case of his death, with the consent and approval of her then guardian, then I direct that one-half of her share shall be paid to her upon her marriage, and the other half when she becomes twenty-five).

"In case I shall leave surviving me one or more children besides my daughter Nancy, then I direct that the said rest, residue and remainder of my estate shall be divided equally among my said husband and all of my children share and share alike, my husband and my children sharing *per capita*, and the shares of said children to be held in trust as above provided in the case of Nancy as being the only one.

"And I give, devise and bequeath the said rest, residue and remainder as aforesaid to each and to their heirs and each of them forever.

"I constitute and appoint my said husband, Henry P. Clarke, to be executor and trustee of this my will, and direct that no bonds be required of him under either appointment.

"In witness whereof, I have hereunto set my hand and seal at Bridgeport, Conn., this twenty-fifth (25th) day of May, A. D. 1891.

"JULIA H. CLARKE. [Seal.]

"Signed, sealed, published and declared as and for her last will and testament by the said Julia H. Clarke in our presence, who, in her presence and at her request, and in the presence of each other, have signed our names as witnesses thereto.

"WILLIAM H. COMLEY, Bridgeport, Ct.
"JOSEPH J. ROSE, Bridgeport, Ct.
"GEORGE P. CARROLL, Bridgeport, Ct."

"STATE OF SOUTH CAROLINA,
"COUNTY OF RICHLAND.

"I, Mrs. Julia H. Clarke, wife of Henry P. Clarke, formerly residing near Eastover, in the county and State aforesaid, but now residing in the city of Columbia, of said county and State, having made my last will and testament bearing date the 25th day of May, A. D. 1891, at Bridgeport, in the State of Connecticut, do now make this codicil to be taken as a part of the same.

"First. I hereby ratify and confirm my said will in every respect save so far as any part of it is inconsistent with this codicil.

"Second. I hereby revoke the third *item* of said will, and in lieu thereof I will and direct that a portion of my estate, sufficient to produce five hundred dollars annually, shall be safely invested by my executor, and the said five hundred be paid annually in quarterly payments to Mrs. Laura Sherwood, of Bridgeport, Conn., during the term of her natural life.

"Third. I further will and direct that after the death of said Mrs. Laura Sherwood that the portion of my estate, which shall at that time be invested for her benefit, under the second item of this codicil, shall then become a portion of my estate, and is hereby disposed of as directed in item five of my said will; and I further direct that if said Mrs. Laura Sherwood shall die before my death, then the investment directed for her benefit under item two of this codicil shall be and is hereby disposed of as directed in item five of my said will.

"Fourth. I further will and direct that after the death of my father, S. H. Hurd, that the portion of my estate which shall at that time be invested for his benefit, as directed in item two of my said will, shall then become a portion of my estate, and shall be disposed of as directed in item five of my said will; and I further direct that if my said father shall die before my death, then the

investment directed for his benefit in said item two shall be disposed of as directed in item five of my said will.

"In witness whereof I, the said Julia H. Clarke, have hereunto subscribed my name and set my seal to the foregoing codicil of four items, at Columbia, in said State, this 11th day of November, A. D. 1893.

"JULIA H. CLARKE. [L. S.]

"Signed, sealed, published and declared by the said Julia H. Clarke, the testatrix, as and for her codicil to her last will and testament in the presence of us, who, at her request, in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

"ELEANOR R. BENNETT,
"JOHN S. VERNER,
"F. H. WESTON."

Third.

That said testatrix left surviving her as the persons entitled under the said fifth residuary paragraph of said will, her husband, the said Henry P. Clarke, and their two infant daughters, Nancy B. Clarke and Julia Clarke. The said Julia Clarke departed this life at Waverly, aforesaid, on May the 20th, 1894, a little more than three months after the death of her said mother, in the fifth month of her age, intestate, unmarried and without issue, leaving as her heirs at law and the distributees of her estate her father, the said Henry P. Clarke, and her sister, the said Nancy B. Clarke. That the said Nancy B. is an infant in the seventh year of her age, residing with her said father at said Waverly; that the said Henry P. Clarke and the said Nancy B. are the only persons now entitled under the said fifth and residuary paragraph of said will, and that the testatrix, her deceased daughter, Julia, the said Henry P. Clarke and the said Nancy B. were all residents of the county and State aforesaid, and the said Henry P. Clarke and Nancy B. have continued to be and still are residents thereof.

Fourth.

That the property covered by the said will and the said fifth and residuary paragraph thereof consists of real and personal estate in the States of South Carolina, New York, Connecticut and Kansas, and is composed mainly of interests of the testatrix therein, which have not been severed from the interests of other persons.

Fifth.

That the plaintiff has undertaken the burthen of the administration of the estate of the testatrix, but is in doubt as to the true construction of said will, especially of the fifth and residuary

paragraph thereof, and as to his interests in authority, powers and duties as executor of and trustee under said will, especially as to whether the said will does as he has been advised or does not operate a conversion of the entire estate of the testatrix into personalty to be administered as such by the plaintiff as executor of and trustee under said will.

Wherefore the plaintiff prays judgment for the judgment and direction of the Court in regard to the true construction of said will, and especially the fifth and residuary paragraph thereof, and as to his powers and duties as said executor and trustee under said will in the premises, and for such other further relief as may be just and proper.

FRANCIS H. WESTON,
BACHMAN & YOUMANS,
Plaintiff's Attorneys.

Thereafter the defendant, by W. G. Childs, Esq., her duly appointed guardian *ad litem*, filed the following

ANSWER.

The defendant, Nancy B. Clarke, by W. G. Childs, Esq., her guardian *ad litem*, duly appointed by order of the Court of Common Pleas, of date the 8th day of July, 1895, answering the complaint herein, says that she is an infant of tender years, and therefore denies knowledge or information sufficient to form a belief as to the truth of the allegations of said complaint.

W. G. CHILDS,
Guardian ad litem.
WM. H. LYLES,
Attorney for Guardian ad litem.

Issue having thus been joined, upon due notice given, the following testimony was taken:

It is agreed between the counsel for plaintiff and defendant that the testimony herein be taken before a Notary Public.

HENRY P. CLARKE, a witness for plaintiff, being duly sworn, says:

Direct.

Q. What was your relation, Mr. Clarke, to Mrs. Julia H. Clarke? A. I was her husband.

Q. When did she die? A. February 10, 1894.

Q. Where did she die? A. At my residence in Waverly, a suburb of the city of Columbia, S. C.

Q. Did she die testate or intestate? A. She left a will.

A certified copy of the last will and testament of Julia H.

Clarke introduced, dated May 25, 1891, admitted to probate in Richland County, February 14, 1894.

Letters testamentary to witness as executor, February 14, 1894, exhibited.

Q. What family did Mrs. Clarke leave surviving her? A. She left two daughters and myself.

Q. Left witness, her husband, and two daughters? A. Yes, sir.

Q. Name them. A. Nancy Barnum Clarke and Julia Clarke.

Q. What is the age of Nancy Barnum Clarke? A. She was six years old February 6, 1895.

Q. How as to Julia Clarke, the other daughter? A. She was born in the latter part of December, 1893, and died May 20, 1894.

Q. Where does the infant, Nancy B., reside? A. She resides with me at my home.

Q. At what place, sir? A. In Waverly, Columbia, S. C.

Q. Where had Mrs. Clarke, her daughter, Nancy, the deceased daughter, Julia, and yourself been residing previously? A. At Waverly, city of Columbia, S. C.

Q. For what time had you and Mrs. Clarke been residents of Richland County, S. C.? A. We have been residents of Richland since 1886.

Q. Did Mrs. Clarke die possessed of any real estate in South Carolina? A. Yes, sir.

Q. She owned a plantation in this county and in Sumter? A. Partly in Richland and partly in Sumter, yes, sir.

Q. What is it known as? A. Known as Good Will Plantation.

Q. How many acres does it contain? A. About 5,000 acres.

Q. What was that property worth, would you say, at the time of her death? A. About $20,000.

Q. Was that the only real estate she died possessed of in South Carolina? A. Yes, sir, to the best of my knowledge.

Q. How as to her personal property? A. (Inventory of her personal estate introduced, amount $825.25). This is all I know of. She had no other personal property in possession.

Q. Had she interest under will or otherwise? A. Yes, under the will of her grand-father, Phineas T. Barnum, of Bridgeport, Connecticut. An unsevered interest.

Q. In what different States did this property lie? A. Connecticut, New York and Kansas.

Q. Did Mrs. Clarke die indebted? A. She left debts, yes, sir.

Q. In round numbers, about how much was she indebted at the time of her death? A. I should say very close to $30,000.

Q. The $100,000 legacy which was left to Mrs. Clarke by the will of Phineas T. Barnum, had that been advanced in her lifetime or not? A. She had received it all prior to her death.

Q. Mrs. Clarke was a lady of good intelligence? A. Yes, sir.

Q. In perfect health at the time of making her will and codicil? A. Yes, sir.

Q. She was cognizant of the state of her affairs and property? A. Yes, sir.

The Statutes of the States of New York, Connecticut and Kansas as to the distribution of intestate estates introduced.

Q. This inventory that has been introduced contains her entire personal estate? A. Yes, sir.

Q. Did you state where the child, Julia, died? A. Died at Waverly.

Q. The entire family reside together? A. The entire family.

Q. Those surviving still reside there? A. Yes, sir.

Q. Had this legacy of $100,000 been spent by Mrs. Clarke in her lifetime? A. Yes, sir. She had spent it in her lifetime.

At the time of the execution of her will and codicil and at the time of her death, Mrs. Clarke thought that she would receive several hundred thousand dollars under her grand-father's will, and that the share would consist of real and personal estate.

Cross-examined by W. H. Lyles, Esq.

Q. Mr. Clarke, has a sufficient fund come into your hands as executor of the will in question out of the personal estate of Mrs. Clarke to pay the pecuniary legacies that she gave in the will, and to provide a fund for the annuities which she has given and pay the debts of the esatte? A. No, sir. There has not a sufficient sum come into my hands—not near sufficient.

Q. Will it be necessary for you to resort to the real estate to pay these debts? A. I have had to resort to the sale of real estate for the purpose of paying debts and legacies in part, and will have to further resort to it to discharge them in full.

Examination adjourned till August 2.

AUGUST 2.

Mr. H. P. CLARKE, recalled:

In the property which Mrs. Clarke expected to receive under the will of Mr. Barnum, there were no considerations of the nature of ancestral home, or other local attachment.

There was interposed by Mr. Barnum's will a life estate, that of Mrs. Nancy Barnum, his widow, between his death and Mrs. Clarke's enjoyment of a very considerable portion of what personalty she might receive under the will, say four-fifths thereof, if she received personalty as part of her share.

Mrs. Nancy Barnum was forty years younger than her husband.

The matter within dashes objected to by Mr. Lyles:

Mrs. Clarke's intention was to convert what she might receive under the will into money and invest it in South Carolina.

Her reasons for this were that in the North and West she would have to have her property, if there, managed by agents, and would receive a less rate of interest than that which ruled in the South. In the South she would save expenses and commissions of agents, and could manage or supervise the management personally, besides obtaining higher rates of interest.

Plaintiff had moved South to Richland County in January, 1886. My marriage took place in New York in June, 1886.

From that time Richland County was continuously her home, and her intention was to reside here the remainder of her days.

The following was objected to by Mr. Lyles:

In the event of any of the beneficiaries under her will dying intestate, Mrs. Clarke believed that the property of such beneficiary would be distributable under the South Carolina laws for the distribution of intestate estates.

P. T. Barnum's will introduced in evidence.

Upon these pleadings and the testimony thus taken, the case came on to be tried before Hon. D. A. Townsend, Circuit Judge, presiding in the Courts of the Fifth Judicial Circuit, at his chambers, Edgefield, S. C., while holding the term of the Circuit Court for said county, on the — day of August, 1895. His Honor thereafter filed the following

DECREE.

This cause was heard by me while holding the Circuit Court for the Fifth Circuit, presiding at Edgefield, at my chambers, by the written consent of the attorneys of the parties, and W. G. Childs, the guardian *ad litem* of the defendant, an infant (R. S., sections 2247-8-9, Code, section 144, as amended by A. A., December 24th, 1894, 21st, 793), upon the complaint, answer and evidence appended.

AS TO THE TESTIMONY.

Under my apprehension of the principles announced in Wigram on Wills, page 12, Prop. v. Pl. 17, page pl. 76, page 82 pl. 104, *Roseborough* v. *Hemphill*, 5 Rich. Eq., 105, and *Lawrens* v. *Read*, 14 Rich. Eq., 268, 269, I hold those portions of the testimony objected to by defendant's counsel admissible, to wit: "Mrs. Clarke's intention was to convert what she might receive under the will (of P. T. Barnum) into money and invest it in South Carolina. Her reasons for this were that in the North and West she would have to have her property, if there, managed by agents, and would receive a less rate of interest than that which ruled in

the South. In the South she would save expenses and commissions of agents, and could manage or supervise the management personally, besides obtaining higher rates of interest." * * * *

"In the event of any of the beneficiaries under her will dying intestate, Mrs. Clarke believed that the property of such beneficiary would be distributable under the South Carolina laws for the distribution of intestate estates."

While this ruling is in harmony with my subsequent findings, still these latter are made independently of and without aid from the testimony objected to, and I would make the same findings even had I held said testimony inadmissible, and excluded it.

I find that the allegations of fact in the complaint are each and every one of them true; they have been proved by the testimony.

I further find:

I. That the value of the available personal estate of which the testatrix, Mrs. Clarke, died possessed, was $825.25.

II. That the debts owed by her at the time of her decease amounted to about $30,000.00.

III. That it would require about $35,000.00 to raise the sums necessitated by the provisions in her will in favor of S. H. Hurd, her father; Mrs. Laura Sherwood and Miss Agnes C. Patterson, and

IV. That it was the intention of the testatrix, apparent from the words of her will, that such portion of the rest, residue and remainder of her estate as might consist of realty should not pass as such into the possession of her husband and children, but should be converted into money, and pass into their possession as money in equal shares, they taking *per capita*.

I will briefly state the principles of law, which, taken along with the patent facts in the case, control me in making this finding:

"Whenever there is an absolute necessity to sell in order to execute the will, or wherever there is such a blending of the real and personal estate by a testator in his will, as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the said fund as money, an intent to convert will be implied, and conversion is always a question of intent."

Among the many authorities in support of this, suffice it to refer among text books to—

Bispham's Principles of Equity, 311, *et seq.;* and among decided cases to—

Hunt's Appeal, 105 Pa. St., 128, 141, and cases which have followed in its wake, *inter alia.*

Appeal of Paist, 17 Atlantic Reporter, 6 (Pa.)

In re Marshall's estate, 23 Atlantic Reporter, 391, and the early leading cases of—

Fletcher v. *Ashburner*, 1 Brown's Ch. cases, 590, and the English and American notes thereto.

1 White & Tudor's Leading Cases in Equity, pt. 2.

In the case at bar, all these principles which separately mark conversion unite.

To raise the $65,000,00 necessary to pay the debts of testatrix, and to make the provisions required by the will of testatrix for her father, S. H. Hurd, Mrs. Sherwood and Miss Patterson, there is an absolute necessity to sell to execute the will.

That there is such a blending of the real and personal estate by the testatrix in her will as clearly to show that she intended to create a fund out of both real and personal estate, and as to the effect, in the connection used, of the words "rest, residue and remainder." See cases already cited, and—

Inter alia, Jaudon v. *Ducker*, 27 South Carolina 295.

Moore v. *Davidson*, 22 South Carolina, 93.

Bryan v. *Munton*, 1 R. and M., 503, 5 Eng. Ch. Rpts.

That the shares of the daughters were to go into their hands, as money is put beyond question by the use of the words "pay the sum."

U. S. v. *Anken*, 96 U. S., 308.

Rapalje and Lawrence Law Dict., 941.

Delafield v. *Barlow*, 107 N. Y., 535.

Cherry v. *Greene*, 115, 111, 591.

Going v. *Emery*, 16 Pick., 112; 26 Am. Dec., 645.

Dodge v. *Williams*, 46 Wis., 70.

Dodge v. *Pond*, 23 N. Y., 69

Belcher v. *Belcher*, 38 N. J. Eq., 126.

If each of the children was to be paid *a sum in money* and the husband took the same share, he must take his share in money, on the perfect and complete equality scheme of the will, it would seem.

Morehouse v. *Scaife*, 2 M. and C., 707, 708.

Given v. *Holton*, 95 U. S., 591.

"The inquiry," says Adam's Equity, page 139, "is whether the effective trusts do or do not require the conversion to be made." Here the will and facts show that they do.

The laws of the devolution of real estate of intestates being different in the different States where testatrix's various parcels of real estate lay, it can only be by the blending into one fund as personalty, of the real and personalty, that the complete and perfect equality contemplated and ordered by the will can possibly go into effect, as to the realty which the deceased daughter might have received had she lived. If this passes through her as realty, when it does come into possession of her heirs according to the *lex rei sitae* of the various States, it would work an utter subversion of the equality scheme between husband and children, the prominent characteristic of the will. To effectuate this main intent, conversion, power of sale, or any other power necessary will be implied.

Penafield v. *Tower*, 46 N. W. Repr., 413.

In the construction of a will, the intention, whenever it can be legally ascertained, is to govern, and all the rules of construction serve but to attain that end.

Fronty v. *Fronty*, Bail. Eq., 526.

The plaintiff has come properly into the Court of Equity to obtain its judgment for his guide in accordance with his "unquestionable right."

Brown v. *McDonald*, 1 Hill Ch., 300, and to the Court of the domicil of the testatrix, the proper one to be resorted to.

Am. and Eng. Enc. of Law, 635, *et seq.*, and notes.

It is, therefore,

Ordered, adjudged and decreed, That the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personalty at the time of her death of all her real estate of whatsoever description, and wheresoever situated, and that the plaintiff, as executor, receive, administer and account for the same as personalty, and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree.

D. A. TOWNSEND,
Presiding Judge.

A true copy.
August 30th, 1895.

The defendant thereafter, by her guardian *ad litem*, filed the following exceptions, and gave due notice of appeal, as follows:

NOTICE AND EXCEPTIONS.

Please take notice, That, for the purpose of appealing to the Supreme Court, the defendant, Nancy B. Clarke, by W. G. Childs, Esq., her guardian *ad litem*, excepts to the decree of Honorable D. A. Townsend, filed in said cause, upon the following grounds, to wit:

1. Because His Honor overruled defendant's objection to the testimony of the witness, Henry P. Clarke, as follows, to wit:

"Mrs. Clark's intention was to convert what she might receive under the will (of P. T. Barnum) into money and invest it in South Carolina. Her reasons for this were that in the North and West she would have to have her property, if there, managed by agents, and would receive a less rate of interest than that which ruled in the South. In the South she would save expenses and commissions of agents, and could manage or supervise the management personally, besides obtaining higher rates of interest." * * * *

"In the event of any of the beneficiaries under her will dying intestate, Mrs. Clarke believed that the property of such benefi-

ciary would be distributable under the South Carolina laws for the distribution of intestate estates."

2. Because he found as a fact, "That it was the intention of the testatrix, apparent from the words of her will, that such portion of the rest, residue and remainder of her estate as might consist of realty should not pass as such into the possession of her husband and children, but should be converted into money, and pass into their possession as money in equal shares, they taking *per capita.*"

3. Because, from the construction of the will, he concluded that there was an absolute necessity to sell the real estate of the deceased to execute the will.

4. Because, from the construction of the will, he held that there was such a blending of the real and personal estate by the testatrix in her will as clearly to show that she intended to create a new fund out of both real and personal estate.

5. Because he held, as a conclusion from the construction of the will, that the testatrix had directed a conversion of her entire estate into personalty, and adjudged, "That the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personalty at the time of her death of all her real estate of whatsoever description and wheresoever situated; and that the plaintiff, as executor, receive, administer and account for the same as personalty, and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree."

WM. H. LYLES,
Attorney for Nancy B. Clarke, Defendant, and
W. G. CHILDS,
Guardian ad litem.

To F. H. Weston, Esq., and Messrs. Bachman & Youmans, Plaintiff's Attorneys.

Please take notice that the defendant, Nancy B. Clarke, by W. G. Childs, Esq., her guardian *ad litem*, intends to appeal to the Supreme Court from the decree of Honorable D. A. Townsend, filed in said cause, upon the grounds stated in the exceptions herewith served, and to be embodied in the "Case for Appeal."

W. H. LYLES,
Attorney for Nancy B. Clarke, Defendant, and
W. G. CHILDS,
Guardian ad litem.

To F. H. Weston, Esq., and Messrs. Bachman & Youmans, Plaintiff's Attorneys.

We hereby agree that the foregoing shall constitute the "Case for Appeal" in the above entitled cause, that the same shall be printed with reasonable dispatch, and when printed that a copy

thereof shall be signed by counsel for plaintiff and defendant as the agreed "Case for Appeal" to be filed in the Circuit Court, and that another copy thereof shall be signed by the same counsel as and for the "Return" to the Supreme Court, the filing of any other or further "Return" being dispensed with.

The following is the decree of the Supreme Court of South Carolina in this "Case," which is found in 46th S. C., p. 235:

MR. JUSTICE POPE. On the 29th day of June, 1895, the plaintiff above named commenced his action in the Court of Common Pleas for Richland County against the defendant, wherein he prayed the judgment of the Court, for its direction to him in regard to the true construction of the last will and testament, and codicil thereto, of his deceased wife, Mrs. Julia H. Clarke, especially the fifth clause thereof, and as to his powers and duties as said executor and trustee under said will, and for such other relief as is consistent with his case as made. The answer of the defendant, who was an infant of tender years, by her guardian *ad litem*, duly appointed by the Court of Common Pleas for Richland County, in effect submitted her rights to the protection of the Court. The facts of the case are about as follows: Henry P. Clarke, the plaintiff, while domiciled in the State of South Carolina, intermarried with Julia Hurd, in the State of New York, in the year 1886, and the married couple immediately returned to the State of South Carolina, which before the marriage had been adopted as the domicile of the husband, and that State became the domicile of the marriage. In 1891 a daughter, the defendant, Nancy B. Clarke, was born. In 1893 another daughter, Julia Clarke, was born. In 1894 the wife, Julia H. Clarke, died. In May, 1894, the daughter, Julia Clarke, died. For some years after the said marriage the plaintiff and his wife lived on their plantation near Eastover, in Richland County, in this State, and during their residence at that place, and while on a visit to relatives at the North, the wife, Mrs. Julia H. Clarke, made the following will:

"I, Julia H. Clarke, wife of Henry P. Clarke, residing near Eastover, in Richland County, State of South Carolina, being of sound and disposing mind and memory, do make and ordain this my last will and testament, and hereby revoke all other wills by me at any time heretofore made: First. I direct that all my just debts and my funeral expenses shall be fully paid by my executor hereinafter named. Second. I direct that a portion of my estate, sufficient to produce $1,000 annually, shall be safely invested by my executor, and the said $1,000 be paid annually to my father, S. H. Hurd, now in New York city, in quarterly payments,

during his natural life. Third. I give and bequeath to Mrs. Laura Sherwood, of Bridgeport, Conn., the sum of $10,000. Fourth. I give and bequeath to Miss Agnes C. Patterson, of said Bridgeport, the sum of $5,000. Fifth. The rest, residue and remainder of my estate, real and personal, of whatsoever description and wherever situated, I give, devise and bequeath as follows: One-half thereof to my husband, Henry P. Clarke, and one-half thereof to my said husband in trust for my daughter, Nancy, until she becomes twenty-five years of age, and then to pay over the whole sum to her; but if she shall marry before that age, with the consent and approval of her father, or, in case of his death, with the consent and approval of her then guardian, then I direct that one-half of her share shall be paid to her upon her marriage, and the other half when she becomes twenty-five. In case I shall leave surviving me one or more children besides my daughter, Nancy, then I direct that the said rest, residue and remainder of my estate shall be divided equally among my said husband and all of my children, share and share alike, my husband and my children sharing *per capita*, and the shares of my said children to be held in trust as above provided in the case of Nancy as being the only one. And I give, devise and bequeath the said rest, residue and remainder as aforesaid to each, and to their heirs and each of them forever. I constitute and appoint my said husband, Henry P. Clarke, to be executor and trustee of this my will, and direct that no bond be required of him under either appointment."

On the 11th day of November, 1893, at her residence near the city of Columbia, in Richland County, and State of South Carolina, the said Mrs. Julia H. Clarke made a codicil to her said last will and testament, wherein she fully ratified and confirmed said last will and testatemnt, except that she revoked the third item or clause thereof, and in lieu of the provision therein contained in favor of Mrs. Laura Sherwood, of Bridgeport, Connecticut, directed her executor to safely invest such portion of her estate as would yield $500 per annum, and pay the said $500 annually, in quarterly payments, to the said Mrs. Laura Sherwood during her natural life. And she also provided that such parts of her estate as had been invested by her executor to yield the annual payment of $1,000 to her father, S. H. Hurd, and of $500 to Mrs. Laura Sherwood, after the death of each one respectively, should revert to her estate, and be disposed of as under the fifth item or clause of her said last will and testament.

The will and codicil were duly established in the Court of Probate for Richland County, in the State of South Carolina. The plaintiff qualified as her executor. All of the personal estate of the testatrix in the State of South Carolina was $825. Her real estate in the latter State was valued at about $20,000. Her debts amounted to about $30,000. The amount necessary to be invested to raise the annual sums to the said S. H. Hurd and the

said Mrs. Laura Sherwood was about $22,000, and to pay the legacy of Miss Agnes C. Patterson was $5,000, making an aggregate of about $57,000. But the testatrix was entitled to the one-sixth part of the estate of her grand-father, the late P. T. Barnum, of Bridgeport, Connecticut, consisting of real and personal estate, in a part of which the widow of the late P. T. Barnum had a life estate. The estate of the late P. T. Barnum was located in three States—Connecticut, New York, and Kansas. Under the statute law of Kansas, whatever lands descended to the infant, Julia Clarke, through her mother, the testatrix, on her death vested in her father, the plaintiff. Under the statutes of New York, such share descended to the father for his life, with remainder to the infant defendant, Nancy B. Clarke. While in Connecticut, such estate of the infant, Julia Clarke, would vest absolutely in the defendant, Nancy B. Clarke. While, to the contrary, if, under the provisions of the will of Mrs. Julia H. Clarke, deceased, her whole estate in the States of South Carolina, Connecticut, Kansas, and New York, the rest, residue, and remainder of testatrix's estate, after the payment of debts and legacies, would devolve in equal portions upon the plaintiff, Henry P. Clarke, and the defendant, Nancy B. Clarke—for, of course, the State of South Carolina being the State of domicile of both Mrs. Julia H. Clarke, the testatrix, as well as that of her infant deceased daughter, Julia Clarke, the personal estate of said infant daughter, Julia Clarke, would be equally divided between her father, the plaintiff, and the defendant, her sister. The plaintiff filling both the office of executor and that of trustee for his infant daughter, the defendant, was naturally strongly moved by the responsibility thus devolved upon him, and a little more than a year after his wife's death exhibited his complaint in the Court of Common Pleas for Richland County, in this State, which was the Court of the domicile of all parties, wherein he seeks the aid of that Court in the proper discharge of the duties of his two offices of executor and trustee. The hearing came on before Judge D. A. Townsend upon the pleadings and some testimony. The first question submitted to the Judge was the competency of certain testimony offered by the plaintiff; the testimony objected to was that of the plaintiff himself, which was: "Mrs. Clarke's intention was to convert what she would receive under the will (the will of her grand-father, P. T. Barnum), into money and invest it in South Carolina. Her reasons for this were, that in the North and West she would have to have her property, if there, managed by agents, and would receive a less rate of interest than that which ruled in the South. In the South she would save expenses and commissions of agents, and could manage or supervise the management personally, besides receiving higher rates of interest. In the event of any of the beneficiaries under the will dying intestate, Mrs. Clarke believed that the property of such

beneficiary would be distributable under the South Carolina laws for the distribution of intestate estates." The Circuit Judge ruled that this testimony was admissible. Such ruling is excepted to, and forms part of the appeal here taken.

The Circuit Judge made his decree, which will be reported. The defendant appeals, also, from that decree. All the exceptions will be reported. Was the Circuit Judge in error in admitting the testimony excepted to?

The object of this testimony was to show that Mrs. Clarke had a certain intention guiding and controlling her in framing the disposition of her property by this will. We have always understood the rule of law as enforced by the Courts of this State regulating the competency of testimony of this character to be, that anything that will show the surroundings of a testator—his family, their names, age or sex, his property, its name, value or character, his use of words, if in any way peculiar, or to explain any ambiguous expressions occurring in the will—is admissible. We have never known that testimony as to an *intention*, separate and apart from that conveyed by the language used in the will, could be held competent. As was well said by the late Chancellor Job Johnstone, in *Rosborough* vs. *Hemphill*, 5 Rich. Eq., 107: "It is conceived that if the effect or purpose of parol evidence is to introduce into a will matter which it does not contain, so as to constitute it a part of the will; to give to the will in itself considered, operative elements, language or provisions which were not in it before, then such evidence is incompetent in a Court whose sole function is to construe wills * * * Such evidence is very different from that which is offered for the purpose of affording a light by which what is *in* the will, may be read, understood, and applied, which is always proper." It seems to us, that so much of the testimony offered which relates to the purpose in life of Mrs. Clarke in withdrawing her property from the North and West and locating the same in South Carolina, is incompetent, because there are no words manifesting any such purpose as written in her will itself; it would be, in effect, *adding to the will* to allow such testimony, and all will admit that this cannot be done in this way. And we are equally clear, that the last part of this testimony, relating to what the testator thought would occur if any one of the beneficiaries should die intestate before a final distribution of her bounty could be made, for there occurs no language in the will that points to any such contingency. This would certainly be adding a new provision to the will. These exceptions must be sustained, but in so doing we do not help the appellant very materially, for the Circuit Judge distinctly states in his decree that he does not base his decision upon this testimony, although he admitted it as competent; and now we approach the true battle ground.

The second, third, fourth, and fifth grounds raise the issue that

the provisions of the will *as written,* when properly construed, develop the conclusion that the testatrix intended that her real property, wheresoever situated, and of whatsoever description, should become personalty. That such result obtains from the language used in wills when properly construed, in same cases, must be admitted. The Courts of the mother country so hold. The Courts of this country—both federal and State—so hold. In what cases will such a conclusion be proper? We answer, in all those cases where the provision of the will itself manifest that such was the testator's *intention,* if such intention be legal. This intent of the testator when manifested by the language used in the will must be, if legal, carried into execution, for equity looks at the intent rather than the form, and one of its maxims is that equity treats that as done which, in good conscience, ought to be done—so declares, in substance, Mr. Pomeroy, in 1 vol, page 413, of his work on Equity Jurisprudence. We do not hold that a direction by the testator that his lands be sold should appear in the will in order that realty shall become personalty, and we do not know that we can more clearly express our views on this phase of the question than by quoting the language of Mr. Justice F. H. Wardlaw, used in announcing the opinion of this Court in the case of *Farmer* vs. *Shull,* 11 Rich. Eq., 547 and 548, which was as follows: "Equitable conversion of realty into personalty is effected, in strictness, only where a sale of the land is ordered, and disposition of the proceeds is made; *but if the intention to dispose of the subject as personalty can be ascertained from the face of the will, it may not be indispensible that a sale should be explicitly directed as a means of conversion*" (italics ours). "Chancellor Dargan says, with sufficient precision, in *Perry* vs. *Logan,* 5 Rich. Eq., 202: 'Wherever it is apparent from the words of the will that the testator meant that his real estate in that form should not pass into the possession of the objects of his testamentary bounty, but should be converted into money, and as money come to those for whom he designs the benefaction, this will be considered in equity as a bequest of personalty. Under such circumstances it will be treated in all respects as if the conversion had been made by the testator in his lifetime.' So, too, cases might be within the principle of conversion as to some incidents, when no alteration of the form of the estate was contemplated." We might multiply at great length quotations from other cases to the same effect, but we have always felt when our own State decisions recognize fully a principle of law as applied to our own affairs, that should be sufficient. Now, let us turn to the circumstances of this particular case. It is established that South Carolina was the domicile of this testatrix, and that her husband and two children surviving her, as the objects of her bounty, were also domiciled there; that her last will fully discloses that each of the three was to be made equal, one with the other, in the distribution of

her estate. The testatrix must be presumed to have known that, under the laws of this State, it was in her power, by her last will, to divide her whole estate, real and personal, as she might elect to do; and further, that, under our laws, in the event of the death of either husband or child, or children, the estate of the one so dying intestate would be shared equally by the two survivors, whether the estate was realty or personalty. But it must also be assumed that she knew the laws regulating intestate estates in the States of Connecticut, Kansas, and New York, where some of her estate, real and personal, was located. Further, it must be assumed that the testatrix knew of the extent of her estate wherever located, for the will of her grand-father, P. T. Barnum, disclosed the same and her interest therein. We do not think that the fact of her indebtedness to others and her legacies to others, aggregating $65,000, while her personal estate in South Carolina was only $825, operates to any extent to work the conversion of her realty into personalty, so far as the provisions of her will touching these matters is concerned.

How are we to regard the provisions of the fifth item or clause of the will? Do these provisions evince an intention of the testatrix to convert her realty into personalty? When the language at the beginnig of this item is considered, it will be seen that she masses, so to speak, her realty and personalty, in the terms "the rest, residue, and remainder of my estate," that is, all that should be left after the payment of her debts and legacies; and this "rest, residue, and remainder" she gives, devises, and bequeaths equally to her husband, for himself, and to him in trust for her daughter, Nancy, if she should be the only child left by her; but in the event there is another child, then she gives, devises, and bequeaths one-third of such rest, residue, and remainder to her husband, absolutely, for himself, and the other two-thirds to him, in trust, one-third for Nancy and one-third for Julia. The use by the testatrix of the term "devise" is of some signification, for usually such a term occurs in the testamentary disposition of an estate in realty, as such; and if there were no other words in the text of this will, negativing this idea of the use of the word "devise" being intended to convey her realty, as such, to these beneficiaries, this would end the matter. However, the use of a word of a technical significance in a will is not allowed, of itself, to fasten down the intent of a testatrix, if other words, phrases, expressions, and sentences or provisions of her will show that her use of this technical word was not intended by her to do more than to show that she meant her realty to pass, commingled with the personalty, under the terms the rest, residue, and remainder of her estate, to these three beneficiaries. It has been decided in this State, in the two cases, *Moore* vs. *Davidson*, 22 S. C., 94, and *Jaudon* vs. *Ducker*, 27 S. C., 295, that when a testator used the words "the rest, residue, and remainder of his estate," "he considered the estate as a

whole, without regard to nice distinction between the realty and personalty of which it was composed. This he had a right to do."

In the case at bar, it will be observed that no positive direction is included in the will for a sale of any of the lands belonging to testatrix for the payment of debts, legacies, or for distribution. The absence of such direction explicitly need occasion no difficulty in this case, for the executor was directed by the terms of the will to pay the debts and legacies, and this he could only do by an application of the property of his testatrix, when sold, to those purposes, and in the execution of this power, after the personal property of his testatrix was had, the lands could be sold; for it must be remembered, it is only "the rest, residue, and remainder of realty and personalty," *after the payments of debts and legacies,* that is given to the beneficiaries provided in the fifth item of the will. Of course, in the absence of explicit authority in the will to the executor to make sales of property to pay debts and legacies, such executor would have to apply to the Court for such leave for those purposes. What else is there in this will that will aid us in reaching the intention of the testatrix? It will be seen in the fifth item or clause that the testatrix, when she comes to speak of the duty of the plaintiff as to the one-half of the rest, residue, and remainder of her whole estate, real and personal, he shall receive in trust for his infant daughter, Nancy B. Clarke, declares that "he shall hold such one-half until she, Nancy, becomes twenty-five years of age, and then *to pay* the *whole sum* over to her; but if she shall marry before that age with the consent and approval of her father, or in case of his death, with the consent and approval of her then guardian, then I direct that *one-half of her share shall be paid* to her upon her marriage, and the *other half* when she becomes twenty-five." Around these words revolve this contention. What was Mrs. Clarke's intention, as herein expressed, as to how she meant any share in her realty should be held by Nancy and Julia through their trustee? Was it to be as realty or personalty? Certainly the trustee was to hold two-thirds of the estate, which he received for his two daughters, for them. The will does not say he shall "turn over," but shall "pay over." What does "pay over" mean, when connected with the words "the whole sum," in the one instance, and one-half of her share on her marriage, and the other half of her share on attaining the age of twenty-five years? Surely it must mean that the sum of money from the commingled "rest, residue, and remainder of her whole estate, real and personal," when the same shall be converted into money, shall be paid. If it be so, will not equity construe that Mrs. Clarke, by the language used by her in her last will, has directed that her realty be converted into money, and paid two-thirds thereof to the plaintiff as trustee for his two daughters, and having so directed in her last will and tes-

tament, the Court of Equity, in the promotion of right, will now consider as done what ought to be done? We think this is the true intention of this testatrix.

The exceptions above enumerated to the decree must be overruled.

It is the judgment of this Court, that the judgment of the Circuit Court be affirmed.

No. 216.

Brf. of Youmans for P. in E.

Office Supreme Court U. S.
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JAMES H. MCKENNEY,
Clerk.

Filed Mar. 22, 1900.

SUPREME COURT OF THE UNITED STATES.

October Term, 1899.

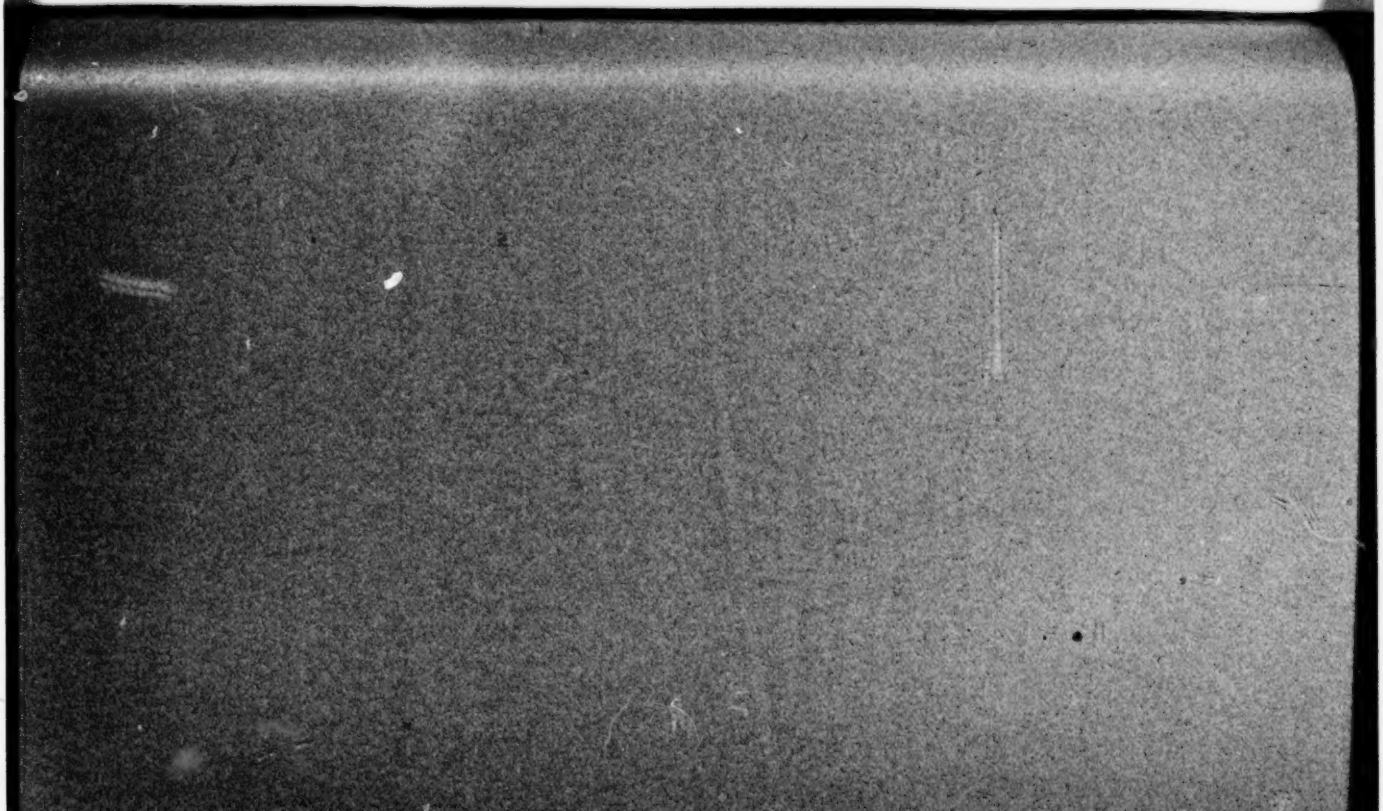
No. 216.

HENRY P. CLARKE, Plaintiff in error,

vs.

NANCY B. CLARKE, JOHN H. PERRY, Guardian *ad litem* of Nancy B. Clarke, and HENRY P. CLARKE, as administrator of the personal estate of Julia Clarke, deceased, defendants in error.

LEROY F. YOUMANS,
For Plaintiff in Error.



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NANCY B. CLARKE, JOHN H. PERRY, Guardian *ad litem* of Nancy B. Clarke, and HENRY P. CLARKE, as administrator of the personal estate of Julia Clarke, deceased, defendants in error.

STATEMENT.

Mrs. Julia H. Clarke died testate February 10, 1894, in South Carolina, of which State she was and had been a citizen, and in which she had had her residence and domicile continuously from her marriage in 1886. She left surviving her, her husband Henry P. Clarke, and two daughters, Nancy B., then five years of age, and Julia, then one month old, all of whom also had their residence and domicile in said State. The daughter Julia died in said State May 20, 1894, three months and ten days after the death of her said mother, in the fifth month of her age.

Mrs. Clarke left of force a will and codicil thereto, which latter was executed in South Carolina, November 11, 1893. These were duly admitted to probate by the Probate Court for Richland County in said State, the County and State of her residence and domicile, February 14, 1895, and on the same day letters testamentary were duly granted by said Court to said Henry P. Clarke, who duly qualified as executor and entered upon his duties as such.

The fifth paragraph of the will is: "The rest, residue and remainder of my estate, real and personal, of whatsoever description and wheresoever situated, I give, devise and bequeath as follows: one half thereof to my husband, Henry P. Clarke, and one half thereof to my said husband in trust for my daughter Nancy, until she becomes twenty-five years of age, and then to pay the whole sum over to her; but if she shall marry before that age with the consent and approval of her father, or in case of his death, with the approval and consent of her then guardian, then I direct that one-half of her share shall be paid to her upon her marriage, and the other half when she becomes twenty-five.

In case I shall leave surviving me one or more children, besides my daughter Nancy, then I direct that the said rest, residue and remainder of my estate shall be divided equally among my said husband and all of my children share and share alike, my husband and my children sharing per capita, and the shares of said children to be held in trust as above provided in the case of Nancy as being the only one. And I give, devise and bequeath the said rest, residue and remainder as aforesaid to each and to their heirs and each of them forever.

I constitute and appoint my said husband, Henry P. Clarke, to be executor and trustee of this my will, and direct that no bond be required of him under either appointment."

The property covered by the will and this fifth and residuary paragraph thereof consisted of real and personal estate in the States of South Carolina, Connecticut, New York and Kansas, and was composed mainly of interests of the testatrix herein which had not been severed from the interests of other persons. The personal and real estate of the testatrix unsevered from the interests of other persons was totally insufficient to pay either her debts or the legacies created by her will. Henry P. Clarke, the excutor and trustee under said will, having undertaken the burden of the administration of the estate and of the trust confided to him, found himself embarrassed and in doubt as to the true construction of the will, especially of this

fifth and residuary paragraph thereof, and as to his interests in, authority, power and duties as executor of and trustee under said will, especially as to whether the will did or did not operate a conversion of the entire estate of the testratrix into personalty to be administered as such by the plaintiff as executor of and trustee under said will. He accordingly brought suit against the said Nancy B. Clarke, the only person besides himself, interested under said will and in said estate in the construction thereof, in the Circuit Court of Common Pleas for Richland County, South Carolina, the County of the residence and domicile of the testatrix, of himself and of the said Nancy B. Clarke, praying judgment for the judgment and direction of the Court in regard to the true construction of said will and especially the fifth and residuary paragraph thereof, and as to his powers and duties as said executor and trustee, and for such other and further relief as might be just and proper. Nancy B. Clarke was duly and properly served with process, and duly and properly represented in the cause, both in the said Court, and in the Supreme Court, the Appellate Court of last resort in the State. The Circuit Court in due course arrived at the conclusion "that it was the intention of the testatrix, apparent from the words of her will, that such portion of the rest residue and remainder of her estate as might consist of realty, should not pass as such into the possession of her husband and children, but should be converted into money, and pass into their possession, as money, in equal shares, they taking per capita." The Court ordered, adjudged, and decreed "That the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personalty at the time of her death, of all her real estate of whatsoever description, and wheresoever situated, and that the plaintiff as executor, receive, administer and account for the same as personalty, and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree." From this decree and judgment of the Circuit

Court August 30,1895, an appeal was regularly taken by the said Nancy B. Clarke to the Supreme Court of the State of South Carolina, which on March 18, 1896, affirmed this judgment of the Circuit Court. The plaintiff in error contends that the Supreme Court of Errors of the State of Connecticut in its final judgment in the case at bar erred in not giving full faith and credit to these judicial proceedings of the State of South Carolina, the right to which was specially set up and claimed by him under Article four, Section one of the Constitution of the United States, and in deciding that the said will did not work an equitable conversion into personalty at the time of her death of the real estate of Julia H. Clarke, situate in the State of Connecticut, and that Nancy B. Clarke was sole heir of a certain undivided interest of the real estate of the said Julia H. Clarke in the State of Connecticut which interest passed as real estate under her said will, and assigns the same as error. The decisions of the Circuit and Supreme Court of South Carolina will be found in 46 So. Ca. page 235; of the Supreme Court of Errors of Connecticut in 70 Conn. p. 195 and p. 483.

AUTHORITIES.

The leading case upon the construction of Art. IV Sec. 1, Cons. U. S. and the Act of Congress in connection therewith is Mills vs. Duryee, 7 Cranch 483. Art. IV Sec. 1 reads thus: "Full faith and credit shall be given in each State to the public Acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such Acts, Records and proceedings shall be proved, and the effect thereof." "It is argued that the Act of Congress 26 May, 1790, Ch. 11 Vol. 1 p. 122, now Section 905 Rev. Sts., provides only for the admission of such records as evidence, but does not declare the effect of such evidence when admitted. This argument cannot be supported. The Act declares that the record duly authenticated shall have such faith and credit as it has in the State Court from whence it is taken. If in such Court it has the faith and credit of evidence of the highest nature, viz.: record evidence, it must have the same faith and credit in

every other Court. Congress have therefore declared the effect of the record by declaring what faith and credit shall be given to it. It remains only then to inquire in every case what is the effect of a judgment in the State where it is rendered. In the present case the defendant had full notice of the suit, for he was arrested and gave bail, and it is beyond all doubt that the judgment of the Supreme Court of New York was conclusive upon the parties in that State. It must therefore be conclusive here also." * * * Another objection is that the Act cannot have the effect contended for, because it does not enable the Courts of another State to issue executions directly on the original judgment. This objection, if it were valid, would equally apply to every other Court of the same State where the judgment was rendered. But it has no foundation. The right of a Court to issue execution depends upon its own powers and organization. Its judgments may be complete and perfect and have full effect independent of the right to issue execution. * * * were the construction contended for to prevail, that judgments of the State Courts ought to be considered prima facie evidence only, this clause in the Constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest, however, that the Constitution contemplated a power in Congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the Act of Congress, unless it declares a judgment conclusive when a Court of the particular State where it is rendered would pronounce the same decision." Id. p. 485. * * * "When Congress gave the effect of a record to the judgment, it gave it all the collateral consequences." Mills vs. Duryee, 7 Cranch, 484. There is a dissenting opinion by Johnson J. alone, from an apprehension that receiving the plea of nul tiel record might at some future time involve the Court in inextricable difficulty. In his dissent he says inter alia that one of the eternal principles of justice which never ought to be dispensed with, and which Courts of Justice never can dispense with, but when compelled by positive stat-

ute, is that jurisdiction cannot be justly exercised by a State over property not within the reach of its process, or over persons not owing them allegiance or not subjected to their jurisdiction by being found within their limits. Id. 7, Cranch, 486.

Chief Justice Marshall who delivered the opinion of the Court in Mills vs. Duryee, says in the opinion of the Court, which he delivered in Hampton vs. McConnel, 3 Wheaton 235, that, "The doctrine there held was that the judgment of a State Court should have the same credit, validity and effect, in every other Court in the United States, which it had in the State where it was pronounced, and that whatever pleas would be good to a suit thereon in such State, and none other, could be pleaded in any other Court in the United States."

"It is conclusive of everything decided by it." Morton & Co. vs. Naylor 1, Hill Ch. (So. Ca.) 445.

In connection with what Johnson J. says in Dungee vs. Mills in his dissenting opinion, that "Jurisdiction cannot be justly exercised by a State over property not within the reach of its process." See the opinion of the Court of in Massie vs. Watts, delivered by Marshall, C. J., 6 Cranch. 160. "Upon the authority of these cases," (to wit: Penn. vs. Lord Baltimore, 1 Vez. 444. Arglasse vs. Muscham p 1 Vernon 75. The Earl of Kildare vs. Sir Morrice Eustace and Fitzgerald, 1 Vern. 419. Toller vs. Carteret, 2 Vern. 494), and of others which are to be found in the books, as well as upon general principles, this Court is of opinion that in a case of fraud, of trust, or of contract, the jurisdiction of a Court of Chancery is sustainable wherever the person may be found, although lands not within the jurisdiction of that Court may be affected by the decree." * * * "Where the defendant in the original action is liable to the plaintiff as trustee, the principles of equity give a Court jurisdiction wherever the person may be found and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction," 158. As to the case of Penn. vs. Lord Baltimore, Mar-

shall, C. J., calls special attention to this that "In the subsequent part of the opinion, where he (the chancellor) treats of the objection to the jurisdiction of the Court, arising from its inability to enforce its decree in rem, he allows no weight to that argument." 6 Cranch. 159.

"Where the necessary parties are before a Court of Equity, it is immaterial that the res of the controversy, whether it be real or personal property is beyond the territorial jurisdiction of the tribunal. Without regard to the situation of the subject matter, such Courts consider the equities between the parties, and decree in personam according to those equities. Phelps vs. McDonald, 99 U. S. 308. The opinion of this Court in Cole vs. Cunningham, 133 U. S. 119, reaffirms this and goes on to say "Such is undoubtedly the result of the clear weight of authority, and the rule has been often applied by the Courts of the domicil against the attempts of some of its citizens to defeat the operation of its laws to the wrong and injury of others." The same case at page 125 cites with approbation from the leading case of Dehon vs. Foster, 4 Allen 545, this: "The defendants being citizens of this State are bound by its laws. They cannot be permitted to do any acts to evade or counteract their operation, the effect of which is to deprive other citizens of rights which those laws were intended to secure."

The dissenting opinion of Justices Miller, Field and Harlan in that case says: "The higher law of the Constitution of the United States places this restraint upon the Courts of Massachusetts in dealing even with her own citizens, that if her citizens have obtained rights in the Courts of New York which have become a part of the records and judicial proceedings of those Courts, no matter how the law under which those rights are established, may be opposed to the law of the State of Massachusetts, they are to be respected by the Courts of Massachusetts because they are effectual over the parties and subject matter in New York, and because the Constitution of the United States and the Act of Congress of May 26, 1790, assert the principle that the Courts of Massachusetts must give full

credit, by which is meant the same effect to the proceedings in New York which that State gives them. The Constitutional provision which makes this declaration is part of Article IV, and it is in immediate connection with its second section, which declares that "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." The meaning of this is to prevent conflicts between Courts of the different States over the same matters, by establishing the rule that whatever is done or decided in one State shall be respected in every other State when properly proved before it. These are the principles established by Green vs. Van Buskirk, 5 Wall. 307. 7 Wall. 199, after a most vigorous contest twice before this Court. Cole vs. Cunningham, 119 U. S. 136-7.

"Generally, if not universally, equity jurisdiction is exercised in personam, and not in rem, and depends upon the control of the Court over the parties, by reason of their presence or residence, and not upon the place where the land lies, in regard to which relief is sought." Hart vs. Sansom, 110 U. S. 154. "In cases of trust, of contract, and of fraud, the jurisdiction of a Court of Chancery may be sustained over the person notwithstanding lands not within the jurisdiction may be affected by the decree." Carpenter vs. Strange, 141 U. S. 105.

"The decree rendered in Indiana, if valid, so far as it related to the real property in question, bound personally those who were parties in the case, and could have been enforced in the situs rei by the proper proceedings conducted there for that purpose." Cheever vs. Wilson, 9 Wall. 121.

"It" (the legacy to Sarah Darling) "is a charge upon the rest of the real as well as the personal property of the testator. But he (the appellant) states that the real estate is in another sovereignty than that in which the plaintiff has sued, and is therefore out of the jurisdiction of this Court to make any decree concerning it. It is true that the Court cannot in such a case order the land to be sold for the payment of any decree which it may make in favor of the plaintiff. But it is not with-

out power to act efficiently to cause the defendant to pay any such decree. The land may be declared to be charged with the payment of the legacy so as to compel the parties who claim the same as the property of the testator to set off or sell a part of it for such purpose." Lewis vs. Darling, 16 Howard 13.

"As a portion of this railroad is found lying in both Circuits (the Fourth and the Sixth) the first question that presents itself for consideration is, which Court first obtained jurisdiction over the subject matter in controversy? Owens et. al. vs. Ohio Cent. R. R. Co. Central Trust Co. of N. Y. vs. Ohio Cent. R. R. Co., 20 Fed. Rpr. 11. * * * Marshall, C. J., in Smith vs. McIver, 9 Wheat. 532 says "that in all cases of concurrent jurisdiction, the Court which first has possession of the subject must decide it. This rule, the Supreme Court of the United States has approved in several subsequent cases, notably, Buck vs. Colbath, 3 Wall. 341. Riggs vs. Johnson Co., 6 Wall. 166. Page 13. * * * The jurisdiction of a Court attaches upon the service of process, and the Court having gained prior jurisdiction of the cause by service of its process, is not deprived of its jurisdiction by reason of the actual seizure of the property in controversy by the officer of a Court having concurrent jurisdiction. Page 12. "But one question remains unnoticed, and that is, can this Court extend its jurisdiction over the defendant company's property beyond its geographical or territorial jurisdiction. This is a trust estate, and must be administered as an entirety for the protection of all concerned. It is well settled that the Court that first takes jurisdiction of a part of a trust estate has the legal right to administer upon the whole. The State Court in West Virginia acquired full and complete jurisdiction on the day the bill was filed in the Circuit Court of Mason County, and by reason of its removal to this Court, this Court's jurisdiction relates back to that date. It follows that this Court, having prior jurisdiction over that portion of the trust estate found in this (the Fourth) Circuit by reason of the jurisdiction thus acquired, has the right to administer upon that portion of the trust estate

lying between the Ohio river and Corning, Ohio, (in the Sixth Circuit), and an order will be entered extending the jurisdiction of Receiver Sharp over the entire property of the defendant company to that place; and in the event he is obstructed by anyone claiming to act as receiver by another tribunal, he is required and directed to file a motion before the United States Circuit Court for the Sixth Circuit in Ohio, praying that Court to vacate or so modify the order appointing Receiver Martin as it may be in conflict with the order of this Court appointing him receiver, and extending his jurisdiction to Corning, Ohio." Owens et. al. vs. Ohio Cent. R. R. Co. Central Trust Co. of New York vs. Ohio Cent. R. R. Co., 20 Fed. Repr. 15.

"As a rule Courts of Equity have no extra territorial jurisdiction, that is to say, they will not assume jurisdiction when all of the parties as well as the trust property are beyond the limits of the State. But after the Court has first acquired jurisdiction of a part of the trust estate, it is entitled to administer the whole, even though a portion lies within the doman of another State." 27 Am. and Eng. Encyc. of Law, 277-8.

"Judgments are the very voice of law and right." Co. Litt. 39 a. "A judgment permanently settles disputed questions of fact, and applies to the facts as thus settled, established principles of law. It declares the respective obligations of the litigants in regard to the matters which they have consented to submit to the decision of the Court." Freeman on Executions, Sec. 1. "A judgment is the final determination of the rights of the parties in the action." So. Ca. Code, Sec. 296. "The award of execution to produce satisfaction is no part of the judgment." Freeman on Judgments, Sec. 2. "Execution, Executio, signifyeth in law the obtaining of actual possession of anything acquired by judgment of law or by a fine executory levied, whether it be by the sheriff, or the entry of the party." Co. Litt. 154d. "Execution is the act of carrying into effect the final judgment of a Court, or other jurisdiction." Bouvier Law Dict. Tit. Exon. "An execution," says Marshall, C. J.,

in U. S. vs. Nourse, 9 Pet 28, "is the end of the law. It gives the successful party the fruits of his judgment." In Bullock vs. Bullock, N. J. Eq., 27 R. A. 217. Garrison, J., concurs with Magil, J., but only on the ground that the constitutional provision (Cons. U. S. Art. IV, Sec. 1) extends only to judgments and does not embrace executions. "The transcendent force given by the federal law to the judicial proceedings of sister States is confined to such judicial determinations as possess the quality of judgment; it does not extend to proceedings in the nature of executions, or to orders merely ancillary in some special form of relief. That only is judgment that is pronounced between the parties to the action upon the matters submitted to the Court for decision. To judgments thus rendered, the federal law accords in every State the same conclusive force possessed in the State where they are rendered. After judgment in a State Court, all that follows for the purpose of enabling the successful party to reap the benefits of the determination in his favor is execution or in aid of execution. No interpretation has ever been placed upon the federal constitution giving conclusive effect, or indeed any effect at all to the executions of the judgments rendered in sister States, or to any order merely in aid thereof. Such orders lack the quality of judgment, and must be differentiated from judgments, even though embodied in the same decretal orders that pronounce the judgment of the Court. These decretal orders may be defined to be decisions made touching some matter collateral to the issue presented in the record, or required to be passed upon in order to carry into execution the judgment of the Court. To these determinations ancillary to execution, no extra-territorial force is given by the federal law."

Van Sykell dissenting 27 L. R. A. 218, holds: "That the New York decree did not by mere force of the judgment, it being extra-territorial, create a lien upon the lands in New Jersey; yet it was conclusive in favor of the wife's right to have alimony secured by a mortgage on her husband's New Jersey lands, and to have that lien impressed upon them by the New

Jersey Courts. To impress that lien upon lands in New Jersey, the intervention of the New Jersey Court of Equity is necessary, just as it is necessary to sue in New Jersey upon a New York judgment, before execution can issue from the New Jersey Courts." Dixon, Lippincott, Reed and Bojert, J. J., also dissented. The dissenting Judges with Garrison, J., making a majority in favor of what the plaintiff in error here contends for.

"No principle of equitable jurisdiction is more firmly established than that relief will not be refused merely because the subject matter of the controversy is out of the jurisdiction, if the cause is in other respects a proper one for the application of such relief, for chancery acting in personam, and not in rem, holds the conscience of the parties bound without regard to the situs of the property." 2 W. and T. Lc. in Eq. 1824, 4th ed.

"It is a general rule in the construction of wills, that the last domicile of the testator is to be resorted to, in all questions of construction or interpretation. Where a will is made in one country, as to the meaning of the terms used, it is to be construed according to the laws of that country, whether the judicial inquiry as to its meaning and interpretation arise in that country or a foreign country." 3 Am. and Eng. Encyc. of Law 635-6. Title Conflict of Laws. "The law of the place of the actual domicile of the testator must govern in the construction and interpretation of a foreign will. Id. page 637. "Adjudications by foreign courts, being the domiciliary courts of the deceased testator, construing a will, will be binding upon courts elsewhere." Id. page 638. "The Court of the domicile is the forum concursus to which the legatees under a will are required to resort." 8 Am. and Eng. Encyc. of Law 415. Title Foreign Exors. and Admors. "Generally, the laws of the place under which an ancillary administration is taken out, govern the distribution of the assets in the payment of debts, but the distribution of the estate to the heirs and legatees is to be made according to the laws of the domicile of the testator at his death." Id. page 430. "In order to prevent great confusion in

the distribution of assets, the law of the domicile must be held the rule in the distribution, both in succession and bankruptcy." (Ibid note 1) "Where a will or testament of personal property is made in the place of the domicile of the testator, the general rule of the common law is that it is to be construed according to the law of the place of his domicile in which it is made." Story on Conflict of Laws Sec. 479 a. "The same rule of construction will generally apply to wills of immovable property unless it can be clearly gathered from the terms used in the will that testator had in view the law of the place of the situs, or used other language which necessarily referred to the usages and customs or language appropriate only to that situs. Id. Sec. 479h. "A will must be interpreted according to the law of the country where it is made, and where the party making the will has his domicile." Lord Lyndhurst in Trotter vs. Trotter, 4 Bligh. N. S. 502. 3 Wils. & Shaw. 407. "Wills are supposed to speak the sense of the testator according to the received laws and usages of the country where he is domiciled, by a sort of tacit reference, unless there is something in the language which repels or contradicts such a conclusion." The opinion of the Court delivered by Story, J., in Harrison vs. Nixon, 9 Pet. 504. The leading English case is Trotter vs. Trotter, 4 Bligh. House of Lords N. S. 502. Lord Chancellor Lynhurst, where testator died domiciled in India and leaving a will. He owned real estate in Scotland where most of the estate was to be divided, and also personalty. The will was invalid under the laws of Scotland because defectively executed, and the realty went to the heir. ("The law of the place where the real or immovable property is locally situate is to govern as to the capacity or incapacity of the testator, the extent of his power to dispose of the property and the forms and solemnities to give the will its due attestation and effect." Story, Conflict of Laws Sec. 474. 2 Greef on Ev. Sec. 670. The province of the lex reisitae in governing the disposition of real estate by will applying to the capacity of the testator and the formalities of execution.) The question arose in a Scotch

Court as to whether the heir-at-law could take the real estate, and also claim his share under the will, without allowing the real estate to be reckoned with the personalty disposed of by the will, and the Court had to determine the intent of the will as to the Scotch realty. The question was simply one of construction. Held. "It was held most properly in the Court below, that the will was to be interpreted by the law of the land where it was made, and where testator had his domicile, namely, India, i. e. by the law of England; and also that although the will was the subject of judicial inquiry in the Courts of Scotland, the same rule was to be applied to the interpretation of it as if the will had been the subject of consideration and adjudication in the Courts of England. * * * A will must be interpreted according to the law of the country where it is made and where the party making the will has his domicile. There are certain rules of construction adopted in the Courts, and the expressions which are made use of in a will have frequently reference to those rules of construction, and it would be productive therefore of the most mischievous consequences, and in many instances defeat the intention of the testator, if those rules were to be altogether disregarded and the judges of a foreign Court without reference to that knowledge which it is desirable to obtain of the law of the country in which the will is made, were to interpret the will according to their own rules of construction." Pages 584, 587. The fact that the actual execution of the will was not in South Carolina but outside of it while on a visit to relatives, does not affect the proposition that the law of her domicile governs the interpretation and construction. Her domicile after her marriage was continuously in South Carolina where her husband had his domicile. Depuy vs. Wurtz, 53 N. Y. 556. Cauefield vs. Sullivan, 85 N. Y. 153. Harrison vs. Nixon, 9 Pet. 483, 504, 505. The ratification, affirmation and republication of it and the codicil itself were made in South Carolina. Miss Anstruther, a native of Scotland, came to reside in England and was domiciled in London thereafter up to the time of her death. During her

stay in Edinburg on one of those visits, she employed a writer to the signet in Edinburg to prepare her will. She executed it in Edinburg 16 December, 1814. The will was entirely in the Scotch form, and immediately upon its execution was deposited by her in the hands of the writer to the signet by whom it had been prepared, and remained in his hands, unaltered and unrevoked by her, until after her death in London, 1820. It was contended that the will being a Scotch instrument and containing technical phrases wholly unintelligible unless the Scotch law was applied to it, should be construed according to the Scotch law, but it was held that the law of the domicile of the testatrix, England, must prevail. Anstruther vs. Chalmers, 2 Simons 1 to 7. 2 Eng. Ch. Reports.

The note by Bigelow, Story Conflict of Laws p. 651 is: "The rule that a will is to be interpreted according to the law of the testator's domicile is not limited to dispositions of his personal estate, but seems to apply in all cases except where it appears that he expressed his meaning with reference to the laws of some other place. Trotter vs. Trotter, Ubi Supra. Wallis vs. Brightwell, 2 P. Wms. 88. Maxwell vs. Maxwell L. R. 4 H. L. 506. Cauefield vs. Sullivan, 85 N. Y., 153. Story's Conflict of Laws Sec. 479 a, h, m. For example, in cases where a will is inoperative as to real estate in a foreign country, and the question is whether the testator has expressed an intention to dispose of it, which will put the heir to his election, the interpretation is governed, not by the law of the foreign country where the real estate is, but by the law of the testator's domicile. Maxwell vs. Maxwell, 2 D. M. & G. 705. Orell vs. Orell L. R. 6 Ch. 302. Perhaps a specific disposition of real estate in a foreign country separately from other property may be presumed to have been made with reference to the law of that country, and may therefore be interpreted according to that law. See Yates vs. Thompson, 3 Cl. and F. 588. But no such presumption can arise where a testator makes a general disposition of all his property or all his real estate. In such a case the question being simply one of the intentions expressed in

the will, and not of the validity of the disposition, it is evident that the word expresses the same intention as to all the property or real estate wherever it may be. They ought not, therefore, to be intepreted even in the case of real estate, so as to have different meanings in the different countries where the lands may be." Crusoe vs. Butler, 36 Miss. 150. Wilson vs. Cox, 49 Miss 538, 545. Studd vs. Studd, Scotch Ct., Sess. Cas. 4th Series, vol. 8, p. 249. "In the interpretation of wills whether of movable or immovable property, where the object is merely to ascertain the meaning and intent of the testator, if the will is made at the place of his domicile, the general rule of the common law is, that it is to be interpreted by the law of that place at the time when the will was made. Thus, for example, if the question be, whether the terms of a foreign will include the "real estate" of the testator, or what he intended to give under those words; or whether he intended that the legatee should take an estate in fee or for life only; or who are the proper persons to take, under the words "heirs at law," or other designatio personarum, recourse is to be had to the law of the place where the will was made and the testator domiciled. And if the will is made in the place of his actual domicile, but he is in fact a native of another country; or if it is made in his native country, but in fact his actual domicile at the time is in another country; still it is to be interpreted by the law of the place of his actual domicile. The question whether, if the testator makes his will in one place, where he is domiciled, and afterwards acquires a new domicile in another country where he dies, the rule of intepretation is changed by his removal, so that if the terms have a different meaning in the two countries the law of the new domicile shall prevail, or whether the interpretation shall remain as it stood by the law of the domicile where the will was made, is a question which does not seem yet to have undergone any absolute and positive decision in the Courts acting under the common law." 2 Greenleaf on Evidence Sec. 671.

In case of doubt or difficulty as to his powers and duties the

executor or administrator may apply to a Court of Equity for instructions, or for a construction of the will, in order to avoid injustice to himself or injury to the estate. This jurisdiction long exercised is derived from the jurisdiction of Courts of Equity in cases of trust arising in the settlement of estates. 11 Am. and Eng. Enc. of Law, 2 Ed. 910. Treadwell vs. Cordis, 5 Gray 341. Horton vs. Cantwell, 108 N. Y. 255. "An administrator or executor has an unquestionable right, when he finds such difficulty in the administration of the estate as to render the administering of it unsafe, to bring the whole matter with all the parties interested therein to the view of the Court of Equity and ask its judgment for his guide." Brown vs. McDonald, 1 Hill. Ch. So. Ca. 300, 301. And so has a trustee. Perry on Trusts Sec. 928.

"As the executor is liable to account, so he may for his indemnity apply to the Court of Chancery to administer the estate amongst the parties interested." 1 Spense Eq. Jur. 583. "Jurisdiction of an action for the construction of a will is incidental to that over trusts, and exists where the Court is moved on behalf of an executor trustee or cestui que trust, and to insure a correct administration of the power conferred by a will." Bailey vs. Briggs, 6 Lans 356, 56, N. Y. 407. Wager vs. Wager, 89 N. Y. 161. Walnath vs. Handy, 24 How. Pr. 353. 1 Boone Code Pl. Sec. 212, p. 411.

"The incapacity to enforce the decree in rem. constitutes no objection to the suit." 1 Story Eq. Jr. Sec. 744.

"The general principle that the performance of equitable obligations will be enforced without regard to the situation of the property which they relate, is not confined to specific performance, but extends equally to all cases requiring its application where full relief can be administered by the decree." 2 W. and T. L. C. in Eq. p. 1825. Caldwell vs. Carrington, 9 Pet. 101. Ward vs. Arredondo Hop. Ch. 223.

Levy, a citizen of New York, died leaving a will duly admitted to record there. He owned an estate, real and personal, in New York; also Monticello, a farm in Virginia. By his will

he gave the residue of his estate including the real estate in Virginia, to the people of the United States in trust for the establishment and maintenance at Monticello of an agricultural school. If the United States declined to accept the trust, he gave the property on the same trusts to the State of Virginia. The qualified executors brought a suit in equity in New York to have the will construed, to which the State of Virginia did not appear. The New York Court declared this trust provision void. The heirs of Levy then brought suit in equity to have the Monticello estate sold and divided among them to which the State of Virginia was made a party. On appeal by the Commonwealth of Virginia from the decree of the Circuit Court of the State of Virginia ordering the sale of the land, the Court of Appeals of Virginia held thus: "The case was an eminently proper one for a suit by the executors and trustees to have the will construed, and the difficulties which attended its execution removed out of their way by a Court of competent jurisdiction. And it was eminently proper that such a suit should be brought in the Court in which it was brought to wit in the Supreme Court of the State of New York, for the city and county of New York. The testator's domicile was there at the time of his death and had been for a long time before there, "his will was recorded there," his executors qualified and resided there, almost all his heirs and next of kin resided there, and portion of his estate, real and personal, was located there. Why is not the decree of the Court of last resort in the State of New York, in the suit which was brought there, a final and conclusive decree upon the whole matter of the devise? It is not pretended that there was any fraud in the institution or prosecution of that suit, that it was not fairly argued and decided, that the trust attempted to be created by the will was not well represented and defended in the suit. That decree of the Court of last resort in New York must be final and conclusive not only as to the property in New York, but also as to the property in Virginia; unless it be true that the United States did not legally represent the trust

or that the Courts in New York had no jurisdiction of the subject so far as the real estate in Virginia is concerned. We think the United States did legally represent the trust. Cites McGregor vs. McGregor, 9 Iowa 65. Dickenson vs. Hoomes, 8 Gratt 353. Massey vs. Watts, 6 Cranch. 148, to the point that when the object of the suit is to enforce a trust arising ex contractu, or from any other source, the situation of the land will be immaterial, and that the jurisdiction will not fail as to lands out of the State from its becoming necessary to decide upon title to those lands. The subject of the devise is one and indivisible looking to its nature and its objects, and the Court could not well decide upon one part without deciding upon the other. The question as to the validity of the devise, in all its parts is res judicata. The New York Court undoubtedly had cognizance of the entire subject. The Court intended to make an end of the case and to pronounce such a decree as would protect the executors and trustees. The decree in the New York suit is conclusive upon Virginia, though she was not a party. Virginia vs. Levy et. al. 23 Grattan (Va.) 21 to 41. Sales, J., thought the State of Virginia was in no manner bound by the New York suit, but upon the other points concurred.

"Can the Court take jurisdiction of the mortgage on the real estate which is extra territorial? That the decree cannot operate as a conveyance of land out of the State, as it does under the statute within the State, is a matter which does not affect the jurisdiction. Having jurisdiction of the parties, the Court may decide the controversy between them, and effect may be given to the decree as the law shall authorize." McLean vs. Lafayette Bank, 3 McL. 622.

"Courts cannot sustain jurisdiction of naked questions of title to lands beyond the limits of the State; but the jurisdiction of Courts of Equity is sustainable, wherever the person of the defendant may be found, in cases of trusts, of fraud, and of contract, even though lands not within the geographical jurisdiction may be affected by the decree; and its decree will be regarded by other Courts as conclusive, until reversed or an-

nulled." McGregor vs. McGregor, 9 Iowa 65. Such has been the law certainly since the case of Angus vs. Angus, West Rpts. Temp. Hardwick 23.

"It seems to be the better opinion that the law of the domicile of the testator will govern as to what shall be regarded as personal estate, and what real, and the intimation of Jarman to the contrary has not been acquiesced in by the profession, nor by the Courts." 1 Redfield on Wills, Ch. IX, Sec. 15, p. 405.

The Supreme Court of Errors of Connecticut says in Mullen vs. Reed, 64 Conn. 247: "The question of course is what was intended by these words at the time they were put into this certificate of membership; and this is to be ascertained from the words used to express the intention, when read in the light of all the circumstances under which they were used. In ascertaining their meaning it must be borne in mind that the contract embodied in the certificate was made in Massachusetts, by parties domiciled or located there; that it was undoubtedly made with reference to the law of that State alone; and that both by its terms and by the understanding of the parties, it was to be performed there. This being so, the general rule is that it should be construed and interpreted according to the laws of that State. The principle laid down in Staigg vs. Atkinson, 144 Mass. 564 we think equally applicable to an instrument like this. "For purposes of construction, it is always legitimate to consider the time when and the circumstances in which the will was made, and we think the law under which it is made is one of those circumstances." Muller vs. Reed, 64 Conn. 247. "Testator sought to provide for the distribution of his American funds among his American relatives through an American administration, and of his English estate among his English relatives through an English administration. Plaintiff sues as an American executor and trustee for a construction of the will. * * * Plaintiff was not entitled to seek the advice or direction of the Superior Court, except so far as might be necessary for his protection in the administration of his tes-

tamentary trust. The will from which he derives his appointment is that of an Englishman, and receives its force and effect, so far as concerns the property in question from English law. (Russell vs. Hooker, 67 Conn. 24.) While providing for two administrations, it is a single and entire document, and purports to dispose of the testator's whole estate. It cannot have two meanings, one in England and another in Connecticut. If the residuary bequest to the English trustees is broad enough by English law to cover a lapsed legacy of American funds, that effect will be accorded to it in American courts, for the simple reason that such was the intent of the testator; his intent being necessarily that which is attributable by the laws of his domicile to the words which he has used." Harrison vs. Nixon, 9 Pet. 488, 502. Mullen vs. Reed, 64 Conn. 240, 247. Rockwell, Exor. and Trustee, vs. Bradshaw et al., 67 Conn. 14.

"The next objection urged against the decree of the Court below is, that it is void so far as it directed the usual foreclosure and sale of real property not within the territorial jurisdiction of the Court. A part of the Chicago and South Western Railway is in the State of Missouri, and the mortgage which the bill sought to have foreclosed covered that part, as well as the part in the State of Iowa. The court decreed a sale of the entire property covered by the mortgage, and directed the Master who was ordered to make the sale, to execute a good and sufficient deed or deeds to the purchaser. * * Before we can set aside the decree which was made, it ought to be made clearly to appear beyond the power of the Court. Without reference to the English Chancery decisions, where this objection to the decree would be quite untenable, we think the power of Courts of Chancery in this country is sufficient to authorize such a decree as was here made. It is here undoubtedly a recognized doctrine that a Court of equity, sitting in a State and having jurisdiction of the person, may decree a conveyance by him of land in another State, and may enforce the decree by process against the defendant. True it cannot send its process into that other State, nor can it deliver possession of land in another

jurisdiction, but it can command and enforce a transfer of the title. And there seems to be no reason why it cannot, in a proper case, effect the transfer by the agency of the trustees when they are complainants. In McElrath vs. The Pittsburgh and Steubenville Rail Road Co., 55 Penn. St. 189, a bill for foreclosure of a mortgage—in which it appeared, that a railroad company whose road was partly in Pennsylvania and partly in West Virginia, had mortgaged all their rights in the whole road, the Court decreed that the trustee who had brought the suit, being within its jurisdiction, should sell and convey all the mortgaged property, as well that in the State of West Virginia, as that in Pennsylvania. This case is directly in point. The mortgagors here were within the jurisdiction of the Court. So were the trustees of the mortgage. The Court might have ordered the trustees to make the sale. We cannot declare void the decree which has been made." Muller vs.Dows, 94 U. S. 448-450.

Perkins in his note dissents from the doctrine of Jarman as to the law of what place governs the interpretation and construction of wills, and accords in opinion with what plaintiff in error here contends for, that the law of the domicile governs, and in addition to Story, Greenleaf and Lord Eldon, already cited, cites 2 Burge Comm. Col. and For. Law 857, 858. 1 Jarman on Wills, 1; note 2 Amer. ed.

"As the controversy is over the construction of a South Carolina will, it should be construed by the decisions of the Courts of that State. If from the decisions in South Carolina we can say how the will would be construed, if brought under review there, it is our duty to adopt that construction, regardless of what our opinion would be of the instrument as a Mississippi will. Neither in the Newell case, 9 Sm. and Marshall 56, nor in this, is the inquiry what the law is, but what the law is as declared by the South Carolina courts. Whether we do or do not concur in the law as announced in South Carolina is wholly immaterial. If we can certainly know how the courts there have construed, we should follow such construction, even

though it be opposed to the opinion of this Court." Adams vs. Farley, 18 So. Rpr. 391. (Miss.)

The subject matter was the interpretation and construction of the will; and the object of interpretation and construction of the will was to ascertain the intention of the testatrix as in her will expressed. It is patent from her words that her disposition of the residuary property was one—uniform and indivisible, applicable to all of it everywhere, and it would be absurd to say that her words are to be taken in as many different senses as there are States in which she happened to have property. Her intention expressed in the instrument was the object of inquiry, for it is as often called "the law of the instrument." King vs. Melling, 1 Vent. 231; "the pole star," Doedem Long vs. Laming, 2 Burr. 1112; "the sovereign guide," Doedem Dodson vs. Grow, 2 Wils. 322. Independent of authority and decided cases, what court is so competent a priori to place itself as required "in the situation of the testator who made it." Wigram on Wills, Pl. 76, as the court of the domicile? What court so competent advisedly to weigh the hearing and effect of the testimony relating to the posture and condition of testator and his estate? Pell vs. Ball, Speer Eq. 66-80. Rosborough vs. Hemphill, 5 Rich. Eq. 105. Laurens vs. Read, 14 Rich. Eq. 268-269 and "the situation of and circumstances by which at the time of expressing himself, the testator is surrounded, for his words, like those of every other person, tacitly refer to those circumstances?" Wigram on Wills, Pl. 76. Minor vs. Ferris, 22 Conn. 371-377.

"Jurisdiction is the power to hear and determine a cause and it is coram judice whenever a cause is presented which brings this power into action." Ward vs. Arredondo, 6 Pet. 710.

The judgment in the South Carolina case is binding upon the parties in the case at bar. In the two cases Circuit Court of Maryland of Horatio L. Whitridge, assignee of William H. Brune, vs. the Mutual Life Ins. Co. of New York, on two policies issued by it in the name of said Brune, on the life of John S. Barry. Held, that a decree in the case Rosalie C. Barry,

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them upon the policies in suit, and the
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endered it closed the controversy. In-
97 U. S. 331-336, citing Mills vs. Dun-
yhew vs. Thatcher, 6 Wheat 129, Ha-
ll. 1, Burnley vs. Stephenson, 24 Ohio
, 12 N. Y., 156.

truction of the Court of domicile con-
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according to the law of the country
Boyes vs. Bedale, 1 Hem. and M. 805.

LeROY F. YOUMANS,
for Plaintiff in error.

No. 216.
Reply Br. of Plff. in Err.
FILED
APR 7 1900
JAMES H. MCKENNEY,
Filed April 7, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 216.

HENRY P. CLARKE, PLAINTIFF IN ERROR,

vs.

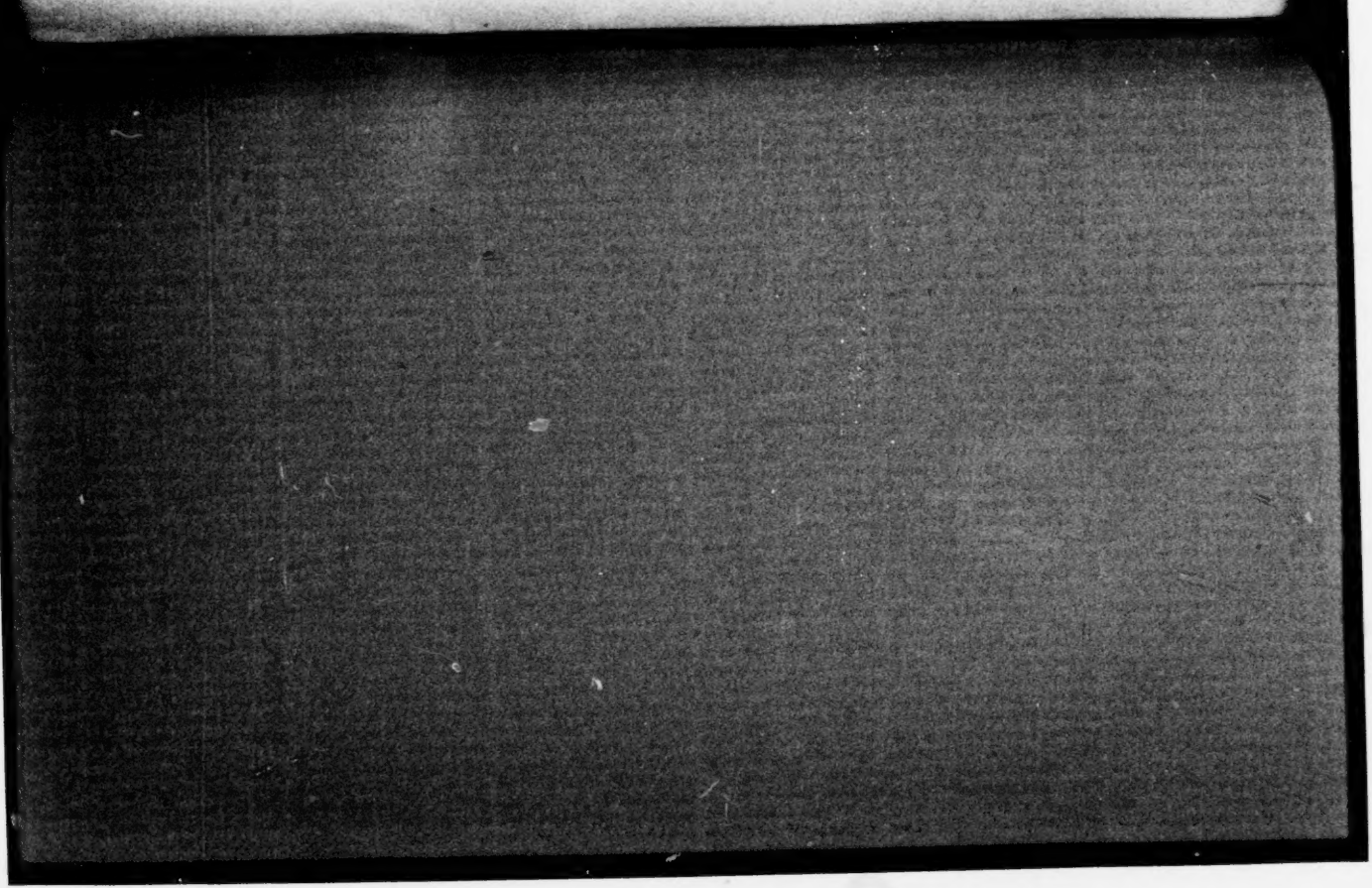
NANCY B. CLARKE AND OTHERS.

BRIEF IN REPLY FOR THE PLAINTIFF IN ERROR.

S. F. PHILLIPS,
F. D. MCKENNEY,
For the Plaintiff in Error.

APRIL 4, 1900.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-7-1900



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Brief in Reply for the Plaintiff in Error.

The record shows, that upon a proceeding for distribution in the year 1897, in a court of probate of the State of Connecticut, a question arose whether a certain interest in land lying in that State, (which had been disposed of by a South Carolina will then before the court,) was realty or personalty, and that it was adjudged to be realty, pp. 6–8; that thereupon a party in interest was allowed to appeal to the proper superior court, p. 9; and that in that court, p. 44, as well as upon further appeal, in the supreme court, p. 46, the judgment in probate was *affirmed;* and further, pp. 19–22, that upon the present writ of error to the latter *the* federal

question presented is, whether by a *finding* made in the course of coming to that judgment the supreme court of Connecticut had given due faith and credit to a previous decree of the supreme court of South Carolina, (see record:—p. 36, "14," and also Brief of Messrs. Youmans & Verner, *App.*,) by which it had been held that because of the effect of a certain South Carolina will, such property had equitably been converted into *personalty*.

The jurisdiction of courts of probate in Connecticut extends to orders for sale of the real estate of deceased persons, for distribution or division amongst the parties entitled thereto, "in the same manner as if such real estate had not been sold." And upon appeals from any such order the superior court, in addition to the functions of the court below, exercises in general its own special powers as a court of equity. "General Statutes of Conn., 1888," sec. 600, as construed in Buel's Appeal, 60 Conn. Report, 63; Chamberlin's Appeal, 70 *Ib.*, 363; and Mark's Appeal, 71 *Ib.*, 122.

The form of application to the probate court was that "Henry P. Clarke," of South Carolina, having been appointed Connecticut administrator of his deceased child Julia, filed a petition in that character for the distribution of her Connecticut estate, whereupon the court held that such estate was *realty*; and that, inasmuch as Julia had died without brothers or sisters excepting one, *i. e.*, "Nancy B. Clarke," the latter only was entitled thereto. After this Henry P. Clarke, in his personal capacity, was allowed to

appeal; Nancy B. Clarke also being a party, and John H. Perry, Esq., her guardian *ad litem*.

In the superior court all of the facts were found and spread upon the record, p. 13, as a foundation for application to the supreme court for "advice." Upon consideration of these the supreme court gave its advice to affirm the judgment in probate—which was done; and an appeal taken thereafter, *ex abundanti*, to the supreme court from the decree so rendered—and upon affirmance of this, the present writ of error was sued out.

The finding of the supreme court of Connecticut, that the record of the South Carolina judgment created no *res judicata*, between the parties before it, was placed upon two grounds: (1), that the decree shown thereby had not been betwixt the same parties; and (2), that the construction by such decree of the will referred to was not competent as to such part of the realty disposed of thereby as lay in Connecticut.

To consider the above points in order.

1. The suit in equity in South Carolina had been brought by *Henry P. Clarke* as "executor" and "trustee," and not expressly in his personal capacity, the defendant thereto being *Nancy B. Clarke*,—and its object was to obtain the advice of the court upon the duty of the plaintiff as trustee for the defendant, in regard to lands lying in South Carolina, Connecticut, New York and Kansas, which his wife,—

the testatrix,—had directed to be equally divided betwixt him, and two young daughters,—he being also appointed guardian and trustee for the latter until they should attain twenty-five years of age,—one of such children, viz., *Julia*, having died soon after the death of the mother, at the age of five months,—so that, whether her interest in her mother's estate were realty or personalty, the whole of it was represented by one or both of the parties to the suit.

Under the authorities cited upon the point as to *parties* in the principal brief for the plaintiff in error,—as well as by the reason of the thing, we submit that it is plain that in applying to a court for its advice about the meaning of a testamentary provision for partition of property, which operated *as a unit* upon him as trustee and also in his personal capacity, Henry P. Clarke was bound by the advice given,—*in both capacities*. This is shown by "*the object of the judgment*," as said in Morton *vs.* Packwood, 3 La. Ann., 167; and is illustrated by Corcoran *vs.* Chesapeake Co., 94 U. S., 741; and, *incisively*, in Fouché *vs.* Harrison, 78 Ga., 359. See also Tilly *vs.* Tilly, 2 Bl. Ch. (*Md.*), 436.

2. We submit that consideration of the material features of the South Carolina decree shows that this should have been allowed operation as *res judicata* by the supreme court of Connecticut.

For, the land devised by the testatrix became the subject of equitable conversion not because of the South Carolina decree, but because of the South Carolina will: And whether the South Carolina court understood this, upon the face of the matter, or

by interpretation, or by construction,—raises no constitutional question as to the fact. The circumstances that under the same will the land was also affected by *a trust*, and that the trustee applied to a court of equity to define his duties thereabouts, and further, that as an incident to such advice the court declared that the land had been equitably converted into personalty;—and moreover that the Constitution of the United States superinduced upon such advice *conclusiveness for all that it contains,— as to all parties thereto,*—are circumstances merely collateral to the matter of the advice in question. The testatrix had a right to make a testamentary disposition (the proper formalities being observed) of her real property lying in Connecticut; and also to modify that disposition, viz:—to create situations in point of fact for that land and its owners by any provisions whatever that were allowable by the laws of that State. *Equitable conversion* is a sort of status as well known to Connecticut courts of equity, as to such courts elsewhere. We say "status,"—*process* might be better; for really it is a mere *fiction* in equitable procedure, "a working theory," that serves, in its place, purposes not dissimilar to those which *John Doe, Scintilla Juris, Express Color*, &c., have ministered to, elsewhere, in their day.

Accordingly it is also *transient*,—continuing, at farthest, only,—where *testamentary*, from the death of the testator to the time when conversion shall have become perfect, and the interest one of the sort intended,—for all purposes and all persons, *as well at law*, as in equity; and it is not only transient, but it exists, so far as it does at all, only in regard to those persons who accept the beneficial interest to which it is incident. In the present case the Connecticut "land,"

for instance, is nothing but land for all purposes in regard to that State as ultimate proprietary, (viz: for all purposes of taxation, &c., and for those of police or the like: as, it is interesting to observe, Lord Hardwicke said expressly as regarded *The Crown*, in Penn *vs.* Lord Baltimore,—) and also indeed as to the whole world excepting Mr. Clarke and his daughter Nancy; and no less as to the latter persons, *except in equity*.

It seems well to look the thing in the face.

The duties in that respect imposed upon Mr. Clarke are imposed upon him not as executor but as trustee. The duties of a trustee once accepted attend his person—(unlike in this to those of executors and administrators—,) *without reference to geographical boundaries or to those of sovereignties*,—into all lands whose tribunals respect the principles of modern European law. Decisions in relation to foreign executors and administrators, as such, therefore are not applicable to the present case, for these savor of *local acts of court*, in *Probates* and *Letters*.

The South Carolina court did not decide whether the personal duty whose existence it declared, was one that devolved entirely upon Henry P. Clarke, or, (because of the situation created by the will) extended also to his daughter Nancy. It declared (1), the existence of an equitable conversion, but did not say *how* or *where* this bit of machinery should effect its object; adding, in substance, only, (2), that the *proceeds* of such *effect*, in whatever way properly accomplished,—should be received by the executor and accounted for accordingly. Inasmuch as the South Carolina court, as is usual in such cases, *retained* the Clarke will for *further directions*, we submit that it is obvious that its decree has

established no detail of subsidiary proceeding, except that any such must tend to effect the object of the will as declared, *i. e., conversion.* In other respects it amounts merely to the old commercial expression, "*Do the needful*": whether *in pais* or in courts of Connecticut, or elsewhere, or however else,—and report here from time to time for approval and further directions! And so the trustee seems to have understood it,—for he soon applied to a court of Connecticut, *in part performance.*

We submit that a South Carolina court is far within the verge of its right when giving advice to a South Carolina trustee as regards a South Carolina trust in matters that, as here, he might perform within South Carolina; and that if by reason of infancy or other collateral circumstance, such advice requires the parties to resort to a foreign court for assistance in such duty, that is not an element to be considered *in the present connection.* The S. C. decree is advice to any party before it subject to the *duty* declared thereby, whether *expressly* or *impliedly*;—leaving *details* of compliance to their own prudence. It is advice, as usual, of the most general sort. And it is advice that might have been effectively obeyed by deeds *in pais*, executed at the very *situs* (?) of such advice,—in the court-room itself, if the parties advised had been *sui juris*; and moreover, it is advice that, under presumptions proper in that case, meant that it should be obeyed by proper subsidiary applications within any State or country where the trust property lay, *if necessary*: the details of such obedience to be thereafter from time to time reported to itself for approval, or correction.

In case Mr. Clarke whilst physically within South Car-

olina could, had he been absolute owner in fee-simple, have conveyed this land by an ordinary deed of proper form for Connecticut, the additional circumstance that a South Carolina court had declared it to be his *duty to some one* to make such conveyance, would have been no obstruction to the validity of the latter. A trustee having a fee-simple has as much power at law to convey the land as if he were not trustee. The only discount upon such validity is in his relation of *trust*. But that incident is not important here, for it would attend equally upon a deed made by a Connecticut trustee. It will be a singular thing if the circumstance upon which Lord Hardwicke fastened to define the competency of action in cases like the present, viz., the existence of *a trust*, should in the same connection be an obstruction. And it is not so. The question here is not as to validity under the law of trusts, but under interstate relation,—*i. e.*, one preliminary to any scanning of trust relations:—violation of the latter being in the meantime also not to be anticipated in the further progress of the matter in the South Carolina court—and indeed no suggestion thereof has been made.

And this is so equally as to incidents arising from the infancy of the defendant Nancy. The principle in regard to possible offence to Connecticut, is to be tested by putting a case upon the same facts, betwixt parties *sui juris*.

Finally, modern authorities do not carry the principle of the matter beyond,—or in any way materially vary from, the principle laid down in Penn *vs.* Lord Baltimore, 1st Vesey, 444; 2 Lead. Cases in Eq., 308; *i. e.*, that *personal duty* in regard to matters of property, *whether executory*, as in contract and trust; or where *broken* as in fraud; may in the former be enforced, or, in the latter, redressed, in equity,

without regard to the situs of any realty involved therein. The American authorities collected in the principal brief for the plaintiff in error, make this proposition good, and these authorities are in accord with the rule laid down in late English text-books of very high character.

For instance, Mr. Dicey's "*Rule*," is as follows: Conflict of Laws, pp. 214–219:

"Subject to the exception hereinafter mentioned the court [of chancery] has no jurisdiction to entertain an action for the determination of the title to, or the right to the possession of, any immovable situate out of England: (foreign land). * * *

"*Exception*.—The court has jurisdiction to entertain action against a person who is in England respecting an immovable situate out of England: (foreign land),—on the ground of either, (*a*) a contract between the parties to the action, or, (*b*) an equity between such parties: with reference to such immovable."

And in Lewin on Trusts, p. [48] the following language occurs:

"How far equitable interests may be engrafted on *foreign* property requires consideration. As regards *movable* estate there is no difficulty," &c., &c.

"As to *lands* lying in a foreign country the court will enforce *natural* equities, and compel the specific performance of contracts, provided the *parties* be within the jurisdiction, and there be no insuperable obstacle to the execution of the decree."

We may be allowed at this point to introduce a recent decision in Virginia which quotes instructive language

from a judge of the highest character amongst those of the Revolutionary period,—*Chancellor Wythe*:—to the whole of whose opinion, as cited hereinafter, we also refer as perhaps the earliest authority upon the present topic to be found in our reports. We may also add "without prejudice" that a biography of the chancellor, prefixed to his Reports, informs the reader that in politics he was "*a Jeffersonian*;" and it is common learning that in 1794, the date of the opinion, politics were warm in Virginia, and things ripening towards the "Resolutions of 1798." His short method with the objection of "State sovereignty" in a case substantially that now before the court, and as well also, that of Penn, &c. (not alluded to by him),—some 44 years older,—should be reassuring in the year 1900.

Hotchkiss *vs.* Middlekamp, 96 Va., 649 (January, 1899):

There, H. H., a woman residing in New York, and owning land in Virginia, had in the year 1836 been adjudged a lunatic by a court of chancery of the former State; and a committee appointed for her by the same court had been authorized to sell the land, which he did, and executed a deed therefor in conformity with the order: no other title being given.

A suit in equity to quiet title having been filed some sixty years afterwards by the persons who then claimed through such deed,—in the course of its judgment thereupon the Supreme Court said:

"It is settled law that real estate is exclusively subject to the laws and jurisdiction of the courts of the nation or state in which it is located. No other laws or courts can affect it. * * * It is true that in cases of fraud, trust and

contract courts of equity will, wherever jurisdiction over the parties has been acquired, administer full relief without regard to the nature or situation of the property in which the controversy had its origin; and even where the relief sought consists in a decree for the conveyance of property which lies beyond the control of the court,—provided it can be reached by the exercise of its powers over the person, and the relief asked be of such a nature as the court is capable of administering (Wimer *vs.* Wimer, 82 Va., 890, and authorities there cited).

"Between these two propositions there is not the slightest conflict. The decree of the court does not operate *ex proprio vigore* in the foreign state or territory, but having jurisdiction over the person, it will in cases of fraud, trust, or contract compel the party within its jurisdiction to obey its decree. As was said by Chancellor Wythe in Farley *vs.* Shippen, Wythe's Reports, 135. 'If an act performed by a party in Virginia who ought to perform it, will be effectual to convey land in North Carolina, why may not a court of equity in Virginia decree that party—regularly brought before that tribunal—to perform that act. Some of the defendant's counsel supposed that such a decree would be deemed by our brethren of North Carolina an invasion of their sovereignty. This shall be allowed the force of a good objection if those who urge it will prove that the sovereignty of that State will be violated by the Virginia court of equity decreeing a party within its jurisdiction, to perform an act there, which act voluntarily performed anywhere would not be such violation.'

"In the last clause above quoted is to be found the very kernel of the matter. * * * If *H. H.* had been of sound mind, and had voluntarily conveyed the property in question, it would have been an act valid everywhere. So if as a result of contract, trust, or fraud she had been under obligation to convey this property, the court of New York, having jurisdiction over her, could have compelled obedi-

ence to its decree, and that act which she could have performed voluntarily would have been equally valid though done under the compulsion of a foreign decree.

"But here we have no such case. *H. H.* was a lunatic. She has made no deed, and was under no obligation to do so,—by contract or otherwise. The authority with which her committee was clothed was derived,—not from her,—but from the laws of New York, and the act of her committee derives its whole vitality from the judgment of the court which clothed him with power as such, and upon his petition decreed the sale of real property of the lunatic lying beyond its jurisdiction, and within the limits of this State."

In conclusion, let us call attention to the naked bones of this case, as showing how very far away it is from any margin of a State's rights as regards immovables within its boundaries,—either in fact or in tendency: It is not questioned that Mr. Clarke and his daughter Nancy,—both residents of South Carolina and both regularly before the South Carolina court,—were, in one proportion or another, by virtue of the will of Mrs. Clarke and the subsequent devolution from Julia,—the sole owners in fee of the land in question, as well under Connecticut law as that of South Carolina. Nor is it questioned that, in one way or another, Mr. Clarke and Nancy may voluntarily make a good title to that land without farther concern upon the part of Connecticut than that its forms of conveyance shall be employed. But no form of conveyance has as yet been executed, or even suggested, by any one! Suppose that Mr. Clarke and Nancy were to make use of conveyances

valid in form, in the course of complying with the South Carolina court's advice. Could these be impeached because made in compliance with such advice? And in deraigning title thereunder,—would not the chain run from Mr. Clarke and Nancy directly to their vendees, without reference—we mean of course *necessary* reference—to the decree, or its advice? If so the South Carolina decree has no bearing upon *title*,—even *in futuro*.

In the meanwhile, who is there to hinder the South Carolina court from compelling parties before it, also *residents*, to comply with its orders, if practicable, and constitutional—as there is no question that any here to be apprehended will be. Is it not true that obedience to the commands of a free State by its citizens or residents is one form of their liberty? What third person therefore, whether man or State, could justly interfere betwixt the organs of such a State and persons resident there who have obeyed its constitutional commands even *in invitum*, as the phrase is?

We make these suggestions as indicating that if the States of Connecticut and South Carolina were really parties to the present contention, it might be thought that the former was theoretically the aggressor, rather than the latter. For the former would be questioning the right of the latter directly to compel its residents to sell, *i. e.* "*convert*," certain Connecticut land, which Connecticut had no objection to their doing voluntarily; whilst *per contra* the latter would only be *requiring* action by such residents in a matter about which the former had really no care: except *that it had been* "*required*."

But this is not the case: South Carolina has been modest in her part of the drama; and Connecticut at most is only benevolently lending her name to a little South Carolina girl who *plays* pouting a bit "before company" at the prerogatives of her guardian in the last resort—the court of chancery of her own State.

The purchasers of the land may be trusted that *good titles* will be demanded and had from the owners in fee before the South Carolina court; and the court of South Carolina, on the other hand, that *fair prices* will be obtained.

S. F. PHILLIPS,
F. D. MCKENNEY,
For the Plaintiff in Error.

APRIL 4, 1900.

No. 216.

FILED
MAR 19

Supreme Court of the United States.

OCTOBER TERM, 1899.

Brf. of Perry for D. & C.

Term No. 216. Case No. 17,309.

Filed Mar. 19, 1900.

HENRY P. CLARKE,

PLAINTIFF IN ERROR,

vs.

NANCY B. CLARKE, JOHN H. PERRY, Guardian ad Litem of NANCY B. CLARKE, and HENRY P. CLARKE as Administrator of the Estate of JULIA CLARKE, deceased,

DEFENDANTS IN ERROR.

In Error to the Supreme Court of Errors of the State of Connecticut.

BRIEF

In behalf of the Defendants, Nancy B. Clarke and John H. Perry her Guardian ad Litem.

JOHN H. PERRY,
WINTHROP H. PERRY,
Attorneys for Defendants.

JOHN H. PERRY,
of Counsel.

THE MARIGOLD PRINTING CO., BRIDGEPORT, CONN.

Supreme Court of the United States.

October Term, 1898.

HENRY P. CLARKE,
Plaintiff in Error.

vs.

NANCY B. CLARKE, JOHN H. PERRY, GUARDIAN AD LITEM OF NANCY B. CLARKE AND HENRY P. CLARKE AS ADMINISTRATOR OF THE PERSONAL ESTATE OF JULIA CLARKE DECEASED.
Defendants in Error.

TERM NO. 216.

CASE NO. 17303.

BRIEF FOR NANCY B. CLARKE AND JOHN H. PERRY, HER GUARDIAN AD LITEM, DEFENDANTS IN ERROR.

I.

CHRONOLOGICAL STATEMENT OF THE FACTS PERTINENT TO THE PRESENT CONTENTION.

One Julia H. Clarke, the wife of the plaintiff in error and a resident of South Carolina, died February 10, 1894, owning a homestead in that State and a large amount of valuable land in Connecticut.

She left a will and two infant daughters, Nancy (this defendant) and Julia.

Julia survived her mother but three months.

The will was duly probated in South Carolina and the plaintiff in error qualified as executor thereof.

A copy of the will is found on page 15 of the record.

In June, 1895, the plaintiff in error "*as executor of the last will and testament of Julia H. Clarke, and trustee of Nancy B. Clarke*, his infant daughter under said will," brought suit against the said Nancy as sole defendant in the Circuit Court for the fifth judicial circuit of South Carolina praying for "the judgment and direction of the Court in regard to the true construction of said will and especially the fifth and residuary paragraph thereof and as to his powers and duties as such executor and trustee under said will in the premises and for such further relief as may be just and proper." (Record p. 14, par. 13.)

No other persons are made parties to the suit and these parties appear in no other capacities than as above specified.

After hearing had, the above Court on August 30, 1895, rendered judgment "that the will of the testatrix Julia H. Clarke, worked an equitable conversion into personalty at the time of her death of all her real estate of whatsoever description and wheresoever situated and that the plaintiff as executor receive, administer and account for the same as personalty and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will and that he have leave to apply for further orders and directions upon the foot of this decree." (Record p. 14, par. 13.)

This judgment was affirmed by the Court of last resort in South Carolina on March 18, 1896.

Up to this date administration had not been granted upon the estate of Julia Clarke, the infant daughter, although one-third of the residue of her mother's estate by the terms of her mother's will (record top p. 16) had vested in her two years before and now belonged to her (the daughter's) heirs free from the trust.

On February 1, 1897, the father was appointed administrator of the daughter Julia's estate in South Carolina (record p. 15, par. 16) and in the following month was appointed ancillary administrator in Connecticut.

He there filed an inventory of the estate of the said daughter as consisting of "an undivided one-third interest in the real estate" above referred to as having belonged to her mother in Connecticut (record p. 6, folio 19; p. 8, folio 20; p. 14, par. 11).

On the 29th of May, 1897, he (solely in his capacity as such administrator) presented a petition to the Connecticut Court of Probate, (record p. 6, folio 19) alleging that the infant intestate "died possessed of real estate" within that jurisdiction and asking the Court to determine to whom it should be distributed.

The administrator in his official capacity and the surviving daughter by her guardian ad litem and no others appeared and were heard on this petition, (record bottom p. 7 and top p. 8.)

The Court of Probate decreed that the sister Nancy was sole heir to and distributee of the property in question.

Thereupon the plaintiff in error *in his individual capacity* appealed to the Superior Court.

His reasons of appeal (p. 12, folio 27) contain no suggestion that his rights depend upon the South Carolina judgment or are affected by the Federal Constitution, neither does the record of the Court of Probate, (bottom p. 7 and top p. 8) indicate that any one claimed in that Court that its order was to be concluded by such considerations.

The Superior Court reserved the questions of law arising in the case for the advice of the Supreme Court of Errors. That Court advised the Superior Court to affirm the decree of the Probate Court, (record p. 18, folio 35). It did so, (record p. 39).

This formal affirmance however was not necessary. The appeal might as well have been simply dismissed or "no error"

found. The Probate decree is to-day the *final* and *only* (as well as the first) judgment determining the question of distribution.

> "An appeal from Probate does not of itself vacate the decrees appealed from. They remain in full force until the appellate tribunal otherwise determines; but the Probate Court ought properly to be *advised* as to the action of the higher Court in respect to all the decrees appealed from, although a judgment by the Superior Court affirming them is not strictly necessary."
>
> Dickinson's Appeal, 54 Conn., 224, 231.

From this judgment of affirmance an appeal was taken to the Connecticut Court of Errors, (record p. 44, folio 75) and "no error" found, (p. 46, folio 77).

Both in the Superior Court and in the Court of Errors the father claimed in argument that that part of the South Carolina judgment which holds that the mother's will "worked an equitable conversion into personalty at the time of her death of all her real estate wherever situated" was not only under the Federal Constitution binding and conclusive in his favor upon the Courts of Connecticut but was also sound in law, (bottom p. 43 and top p. 44).

No finding in the judgment and no other adjudication by it was relied on.

These claims having been overruled he brings this writ of error.

II.

BRIEF SYNOPSIS OF THE SITUATION IN THE LIGHT OF THE FACTS ABOVE DETAILED.

On February 10th, 1894, one third of the residuary estate of the mother became by the terms of her will (top p. 16) vested in the daughter Julia, subject to a temporary trust.

Three months afterwards the daughter Julia died intestate, the trust terminated and her heirs became the absolute owners

of the aboved mentioned third. Part of it consisted of real estate in Connecticut, the transfer and devolution of which is confessedly to be determined by Connecticut law (as witness for instance the application to the Connecticut Court of Probate on that very question at the beginning of this suit).

By Connecticut law this real estate descended at once to her sister Nancy. Nancy remained the actual owner of this real estate until (as is now claimed) the judgment in the South Carolina suit something more than a year afterwards.

The Connecticut decision now in question demonstrates this; for whatever the result of the present writ of error may be, that decision declares what the law *was* and *will remain* in Connecticut, and what the title was and *really is* there. This writ of error does not attack the accuracy of that declaration. It only seeks to prevent Nancy from taking the benefit of the actual law, and her real title, through an estoppel "which ever admits but fences off the truth."

Her father claims that after the South Carolina judgment she was for the future estopped to claim what, as we have seen, had up to that time been undoubtedly hers. Connecticut had given her the title. Connecticut insists that she shall keep it. South Carolina says no! Which shall prevail?

It is evident from the form of the inventory, from the form of the application to the Connecticut Court of Probate at the beginning of these proceedings, from the absence of any suggestion of estoppel in the Probate Record, and from a like absence in the Reasons of Appeal in the Superior Court that the father did not for a long time suppose that the South Carolina decision *proprio vigore* accomplished anything in Connecticut or estopped anybody there. He apparently paid no attention to its command to sell the real estate and distrusted the efficiency of its suggestion that he had power so to do. He passed it on as "real estate" to his daughters representatives and so described it in the application to the Probate Court already referred to.

If the fact that the record does not show that he appeared individually in the Probate Court and made the present consti-

tutional claim there, coupled with the fact that the Probate order has always remained and still is the only judgment in the case determining the descent (Dickinson's Appeal supra), deprives him of a right of review here, we desire to take advantage of it but shall not argue it further.

We now proceed to consider his claim that his daughter is estopped to further insist upon her undoubted title to the Connecticut land in question. Right here it may be noted that this estoppel can be based only on the judgment of the lower Court in South Carolina and upon that *single clause* of it which holds that "the will of the testatrix Julia H. Clarke worked an equitable conversion into personality at the time of her death of all her real estate of whatsoever description and wheresoever situated." No expressions in an opinion can create an estoppel. (Hancock Nat. Bk. v. Farnum, 20 R. I., 466.) If the claimed estoppel exists at all, it must be based upon that brief portion of the judgment above quoted which was alone relied upon on the appeal below, (p 43, folio 74) and which simply determines the legal effect of the language of the will.

III.

A FEW GENERAL PRINCIPLES APPLICABLE TO THE DISCUSSION.

In the case of the Farmers' Loan and Trust Company vs. The Postal Telegraph Company, 55 Conn. 334-335, (in which case the authorities cited by Counsel show that the claim of res judicata was made) the Supreme Court of Errors of the State of Connecticut said: "The Courts of our State will not recognize the right of Courts in other States to affect directly the title to real estate in the former. The most that can be done is to allow foreign courts having jurisdiction of the parties to compel conveyances by the owner and recognize as valid titles so acquired.

We are aware of no case that has gone so far as to recognize the validity of a deed given by a referee or other officer of Court by authority of law in another jurisdiction. The rule

seems to be, that the Courts of each State have exclusive jurisdiction to settle the title to lands within its own limits."

This rule was followed by that Court in the case at bar.

This rule is also affirmed in the decisions of many other of the State Courts and is abundantly sustained in the decisions of this Court.

From before the early leading case of McCormick vs. Sullivant, 10 Wheaton 192 (1825) to the late case of DeVaughn vs. Hutchinson 165 U. S. 566, (1896) this Court has always held as to real estate: (Quoting from the latter case p 570). "It is a principle firmly established, that to the law of the State in which the land is situated, we must look for the rules which govern its descent, alienation and transfer, and for the *effect* and *construction* of wills and other conveyances."

If, as in this case, the Connecticut Court determines to adopt this general rule as to Connecticut real estate, it is immaterial whether the rule is or has been approved by any other Court, State or Federal, unless the Connecticut Court is restrained by some limitation of the Federal Constitution for "International Comity has nothing to do with titles to real estate."

White vs. Howard. 46 N. Y. 144, 167.
See also Green vs. VanBuskirk 5 Wall 307.

Neither could the South Carolina Court well ask by way of comity what it would not reciprocally permit:

> "We think it may be admitted as a general proposition, that such operation is given to acts done in other jurisdictions, as they give to like acts done in ours, upon considerations of comity; but it is a general comity and reciprocity of rights and advantages."
>
> Means vs. Hapgood, 19 Pick 105, 107.

As the decisions of the Court of South Carolina show, that Court claims exclusive jurisdiction over land there situated.

"But neither in England nor in this State is it a part of the law that the law of the domicile has any efficacy when the subject is real estate."

* * * * * * * *

The lex rei sitae governs, "whether the controversy relates to the capacity of persons to take and transfer, to the forms and solemnities of passing the title, to the extent of the interest to be taken or transferred, or to the subject matter, or what are to be deemed immovables."

Lamar vs. Scott, 3 Strob., S. C., 562, (1849).

"All the authorities in both countries, so far as they go, recognize the principle, in its fullest import, that real estate or immovable property is exclusively subject to the laws of the government within whose territory it is situate."

Approved in Beall vs. Lowndes, 4 S. C., 258, 283, (1872).
See also Abrams vs. Mosely, 7 S. C., 150, 152, (1875).
Cureton vs. Mills, 13 S. C., 409, 417, (1879).

It is however claimed by the plaintiff in error that the Connecticut Court has disregarded the provisions of Section 1, Article IV, of the Federal Constitution which provides that:

"Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

But among the defenses not excluded by the above provision of the Federal Constitution are:

"Such as inquire into the jurisdiction of the Court in which the judgment was given, to pronounce it; as the right of the State itself to exercise authority over the persons or the subject matter.

It has been well said 'the constitution did not mean to confer a new power of jurisdiction but simply to regulate the effect of the acknowledged jurisdiction over *persons* and *things* within the State.'" * * * * * *

"The constitution has effected no change in the nature of

a judgment. It only provides that as matter of evidence it shall be entitled to full faith and credit."

McElmoyle vs. Cohen, 13 Peters, 312, 327, 329.

Or, as it was somewhat differently phrased later, this constitutional provision "does not prevent an inquiry into the jurisdiction of the Court in which a judgment is rendered to pronounce the judgment, nor into the right of the State to exercise authority over the parties or the subject matter. * * *

The constitution did not mean to confer any new power on the States, but simply to regulate the effect of their acknowledged jurisdiction over *persons* and *things* within their territory. It did not make the judgment of the State's domestic judgments to all intents and purposes but only gave a general validity, faith and credit to them as evidence."

Cole vs. Cunningham, 133 U. S., 107 (112).

See also Thompson vs. Whitman, 18 Wall 457, 465, 469.

Story on the Constitution, Sec. 1313.

Jurisdiction is defined as that which

"has reference to the power of the Court over the *parties*, over the subject matter, over the *res or property in contest*, and to the authority of the Court to render the judgment or decree which it assumes to make."

Cooper vs. Reynolds, 10 Wall, 308, 316.

A judgment rendered by a Court without jurisdiction is a nullity although the defendant appeared, answered and went to trial without objection.

Riddle vs. Reese, 53 So. Car., 198.

IV.

THE PLAINTIFF IN ERROR CANNOT THEREFORE MAINTAIN HIS ESTOPPEL UNLESS THE ADJUDICATION OF THE SOUTH CAROLINA COURT WAS

A. Between the same parties acting in the same rights or capacities (or their privies).

B. Upon the same question.

C. Within the jurisdiction of the Court in respect of the Connecticut lands, both as to the nature of the action and as to the relief granted or order and decree made.

A.

THE PARTIES WERE NOT THE SAME.

As understood in Connecticut a question to be *res judicata*

> "Must be established by a final judgment; it must have been in issue under the pleadings and must also have been actually litigated and determined; it must be identical with the fact sought to be established in the second action; the identical persons between whom the fact was adjudicated *in the same right or capacity*, or their privies claiming under them, must be the parties to the second action."
>
> Fuller vs. Metropol. Life Ins. Co., 68 Conn., 55, (65).

The Connecticut Court in the case at bar accordingly decided that the South Carolina case lacked the requisite identity of parties to work the estoppel claimed.

This is based upon the following facts: Henry P. Clarke was not a party to that case in his individual capacity at all. He only appeared as "executor and trustee" under his wife's will. No representative of the estate of the daughter Julia (*which estate is alone in question here*) was made a party or appeared or even in fact existed. To these may be added the fact that Nancy was evidently made a party solely in her capacity of cestui que trust under her mother's will and not at all as heir of Julia. The pleadings appear to have left the estate of Julia entirely out of Court (record p. 14, par. 13). While in the case at bar the parties appear exclusively as heirs of Julia.

In support of the decision in the Court below upon this question of parties, we beg to submit the following authorities in addition to the reasons and precedents contained in the decision itself.

"That the record of a judgment can affect only parties and privies and that no one shall have advantage from it who would not have been prejudiced by it are principles with which every lawyer is supposed to be familiar."

Shulze's Appeal, 1 Penn. State, 251.

"It is a rule of both the civil and the common law that a party acting in one right can neither be benefitted nor injured by a judgment for or against him when acting in some other right. As familiar illustrations of this rule it is said that a judgment against one as tutor will not prevent his recovering the same demand in his own right. * * * Where a party has rights or claims property in two or more capacities and is made a defendant in some action or proceeding the pleading against him should show that he is made defendant in each capacity and failing to do so the judgment will often bind him in one capacity only, though he might have been bound in both by appropriate pleadings. * * * If one is made a defendant in an official capacity the judgment will not bind him personally and if made a defendant personally it will not bind him officially."

Freeman on Judgments, 4th Ed. Sec. 156.

"Judgments as a general rule conclude the parties only in the character in which they sue or are sued and therefore a judgment for or against an *executor*, administrator, assignee, *trustee*, agent or attorney as such does not ordinarily preclude him in a different cause of action affecting his own proper person from disputing the special findings in the former cause. * * * There are some apparent, but perhaps no real exceptions to this rule."

Bigelow on Estoppel, 4th Ed. p. 123.

"To ascertain whether a past judgment is a bar to another suit, we are to consider, ———————————— secondly whether the former litigation was between the same parties, in the same right or capacity litigating in the subsequent suit, or their privies respec-

tively, claiming through or under them, and bound and estopped by that which would bind and estop those parties."

Bigelow and another vs. Winsor, 1 Gray, 299, 302.

"It is declared in the article 2265 of the Louisiana Code 'that the authority of the thing adjudged takes place only with respect to what was the object of the judgment.

The thing demanded must be the same: the demand must be founded on the same cause of action, the demand must be made between the same parties and formed by them against each other *in the same quality.*' * * * *

Therefore upon well settled principles coincident with the article 2265 and also independent of it, nothing that was said or done in the case in 12 How. can prejudice her claim as she now makes it."

Gaines vs. Hennen, 24 Howard, 553, 579.

"The essential conditions under which the exception of the res judicata becomes applicable are the identity of the thing demanded, the identity of the cause of the demand, and of the parties *in the character* in which they are litigants."

Washington A. & G. S. P. Co., vs. Sickles 24 How. 333,341 & 2.

Approved, 7 Wall, 102.

"Where a party is sued in one capacity only the judgment estops him as to the capacity in which he is sued and none other."

Bumb vs. Gard, 107 Ind., 576.

A and B were made defendant's only as heirs of C although they *were* devisees of D, (C's wife) at the same time.

"It follows that in their character of such devisees they were not concluded by the order of sale."

Elliot vs. Frakes, 71 Ind., 416.

Where vendor was heir at law of deceased vendee, and as such heir alone was made party to petition of decedent's, administrator to sell the land the judgment did not estop him, as creditor of decedent in a suit for his vendor's lien since "as a general rule judgments conclude the parties only *in the character in which they sue or are sued.*"

Lord vs. Wilcox, 99 Ind., 491.

Judgment for one as guardian does not bind him individually although he might have alleged and litigated his individual interests.

McBurnie vs. Seaton, 111 Ind., 56.

"The general rule likewise is that judgments are only presumptively conclusive against parties in the character in which they sue or are sued."

Adair vs. Mergentheim, 114 Ind., 305.

"When a man sues in one right and fails that is no reason why he may not sue again in another right. If a man sues as executor and fails may he not nevertheless sue again in his individual capacity? Most certainly he may."

Brooking vs. Dearmond, 27 Georgia, 58, 65.

A former adjudication in a case for construction of a will to which case the executors and the appellants in the case at bar were parties (top p. 321) and from which adjudication the respondent in the case at bar, although not a party of record, had a right of appeal does not bind said respondent although a devisee under the will.

Shipman vs. Rollins 98 N. Y. 311, 330.

" The mere fact that the same persons are litigants in the two actions is not always sufficient to satisfy the rule of res adjudicata.

The same person may in law be considered another person and consequently another party by suing in another capacity. * * *

The rule is that a former judgment concluds the party only in the character in which he was sued and therefore

a judgment for or against an executor, administrator, assignee or trustee as such, presumptively does not preclude him in a different cause of action affecting him personally from disputing the findings or judgment though the same questions are involved. * * * * *

The plaintiff now prosecuting in his own proper person representing only his interest as an individual, is not concluded by the prior judgment against him in a representative character, because he must now be regarded in law as a different person and a stranger to the former suit."

Collins vs. Hydorn, 135 N. Y., 320, 324.

The case of Aspden vs. Nixon 4 How. 467, cited in the opinion of the Court below, bears not only upon this point but also upon other points hereinafter made. A brief synopsis of the facts and some quotations from the opinion are as follows:

A. died in England the place of his domicil testate leaving "property" both there and in Pennsylvania. This property consisted apparently in part of personalty.

N. qualified as executor of the will in both jurisdictions. A contest arose as to who was the true beneficiary under the testamentary designation of "heir at law."

In a suit pending in Pennsylvania against said executor to determine this question the Pennsylvania Administrator of one John Aspden of London, together with John's children, appeared as parties and claimed that the said John was intended by the designation "heir at law." N. the above named executor made defense that the said children acting as the English administrators of the said John had tried out this same question in London against him as executor there and been defeated.

The Court among other things said: p. 497.

"The representative character of Nixon in England was altogether distinct from his character as executor in Pennsylvania, and so also the English Administrators of John Aspden's estate are equally distinct from * * the Administrator of his estate in Pennsylvania. It follows the English suit was between different parties from

those prosecuting and defending the American suit, and therefore neither the decree nor the proceedings on which it is founded are competent evidence between the parties to the present suit for this reason; and yet more conclusively for another which is that the property in controversy here is distinct from that sued for in England.

As applicable to such a state of facts the rules of evidence governing Courts of Justice are that a judgment or decree set up as a bar by plea or relied on as evidence by way of estoppel to be conclusive must have been made

1. By a Court of competent jurisdiction upon the same subject matter.
2. Between the same parties.
3. For the same purpose.

And on either ground the evidence submitted to our judgment is incompetent to prove anything in regard to the Pennsylvania assets.

But these conclusions are resisted by these setting up the bar on this ground that the administration of the domicile is the principle administration * * * and this being in England and the assumed devisee's residence also being there, the Pennsylvania administration was auxiliary to the foreign one; that in the British suit the American assets might have been recovered from the Executor Nixon, the bill having gone for the *Pennsylvania assets as well as the English.*

However true it may be in cases peculiarly circumstanced that one jurisdiction administering assets may as matter of comity transmit them to a foreign jurisdiction there to be distributed; still the doctrine can have no application here as no assets had been transmitted to England from Pennsylvania, * * * * * and therefore an assumption to distribute the assets in this Country by the High Court of Chancery in England must necessarily have been treated by the Circuit Court (here) as merely void for want of jurisdiction of the subject matter in the foreign court. * * * * (p. 499). The next ground, and that relied on with most confidence in support of the bar, is that John Aspden, of London, and those representing him after his death were

British subjects, residing in Great Britain, and that the contest and only matter litigated in the High Court of Chancery was whether John Aspden, of London, was or was not the heir and consequent devisee of Matthias Aspden (the testator) and that this fact having been found by the decree against the Complainants established and concluded all proof to the contrary of such adjudication directly on the single fact of title and that the representatives of John, of London, could not be heard in another jurisdiction to disavow the conclusiveness of the finding by a Court of their own Government to which they had resorted. * * * * * * * * We have already stated that the Pennsylvania assets stand unaffected and will only add that the assumption that a Complainant or Plaintiff is estopped by a judgment against him from introducing evidence in a second suit and in another country for other property on the ground that the fact of title had been adjudged and concluded by a former judgment or decree, [*thus separating the title from the property,*] is an abstract proposition inconsistent with the due administration of justice and not recognized in our system of jurisprudence or that of Great Britain, and is aside from any question affecting the comity of nations.

Giving the British decree all the force and effect that could be accorded to it if it had been made in a State of this Union, it yet establishes no fact as respects any title to the Pennsylvania assets, nor would by the *rules of evidence be sufficient in separate suits pending in the same Court for different parcels of property even between the same parties.*"

And especially on this and following points.

See Carpenter vs. Strange, 141 U. S., 87, 105 and 6, (likewise cited in Conn. decision).

Also see Coates vs. Mackey, 56 Md., 416.

We do not see how Mr. Clark could have appealed from the South Carolina decision in his individual capacity had it not been to his liking, and that is always one test of its binding

force. 1 Greenleaf on Ev. Sec. 535 cited in Green vs. Bogue, 158 U. S., 478. 503.

First Bap. Church vs. Syms, 51 N. J. Eq., 363, 367.

B.

THE QUESTIONS WERE NOT THE SAME:

—a—

The two questions may have been "like" but were not the same:

The distinction is well shown by the Court of Illinois, in the very similar case of McCartney vs. Osburn, 118 Ill. 403, (1886), where it was claimed that a previous adjudication in the State of the domicile (Pennsylvania) between the same parties on the same questions constituted an estoppel.

> The Illinois Court says in part, p. 410: "Before a former decision can be succesfully invoked as an estoppel in another suit between the same parties, it must appear that the question is the same in both cases, and that the Court, in the former suit, had power and jurisdiction to determine it. The controversy here is about the quantum or extent of interest which the parties respectively have in certain lands in the State of Illinois, and the question to be determined as respects the appellant is whether he has a half interest or merely one-ninth.
>
> "As respects the appellees, the question is whether they are each entitled to a ninth interest or a sixteenth only. It is manifest the Courts of Pennsylvania had no power or jurisdiction to pass upon either of these questions nor did they attempt to do so. It is true they passed upon a question like these, and the decision upon them as an expression of opinion by that Court is entitled to the highest respect, but that is all. While the decision of that Court is persuasive, it is not imperative. Nor does the fact that this Court, in passing upon these questions, may place a construction upon the will different from that adopted by the Pennsylvanian Courts which will

lead to a diversity of interests between the devisees in the two States in respect to the same kind of property make any difference. Such a contingency is the inevitable result of the complete independence of the Courts of the two States in matters within their exclusive jurisdiction.

"The will, through which all the parties claim, is the written evidence of their respective titles and interests in and to the land sought to be partioned and the construction to be placed upon it presents a question of law which this Court must determine for itself. While it was entirely competent for the Pennsylvania Courts to construe the will and determine the rights of the parties to the property there, yet they could make no order, decree or ruling with respect to the legal effect of the will, that would deprive this Court of the right to construe that instrument for itself, so far as it relates to lands in this State. Where a testator, by a single will, devises lands lying in two or more States, the Courts of such States will respectively construe it, as to the lands situated in them respectively, in the same manner as if they had been devised by separate wills."

The same Court, when the same case came up the second time, (121 Ill. 408) again said in part (p. 411):

"The decision in that case, (104 Pa. St. 637), on the plainest principles of law, conclusively settled the rights of the parties to so much of the realty devised as lies in Pennsylvania and to the entire personal estate wherever situated or found, but it did not at all affect the title of the real property outside of that state."

Every will affecting lands in two different states is universally regarded in the administration of the estate, as a dual will; a will affecting the land in one State and a will affecting the land in the other, which for convenience are united in one form. Either may be administered independently of the other. The plaintiff in error will doubtless admit, that if the Connecticut case had been decided first, no subsequent interpretation by the South Carolina Court would have affected the Connecticut land. The Connecticut will would have been distinguished and conclusively construed by the Connecticut Court.

It is not to be presumed that the South Carolina Court intended to go beyond its jurisdiction. Its decree properly related to the powers and functions of the executor only in so far as he had been qualified by the South Carolina Probate Court, to administer such estate as was within that jurisdiction. The only legitimate subject of adjudication in South Carolina was the proper mode of administering upon the estate of Mrs. Clarke, so far as it was or should be in course of settlement before the Courts of Probate of her own State. That Court could only deal with the property which had come or might come under its control. The South Carolina Court did not necessarily attempt to determine or direct the disposition of the Connecticut lands.

The subject matter presented to the South Carolina Court was a determination of what by the laws of South Carolina was the power, duty and estate of the Executor under the will so far as he was qualified under those laws. It was this and nothing more, because the plaintiff could submit to it nothing more. Whether he had any power, duty or estate, with respect to lands situated in another state, depended upon the laws of that other state *and* his appointment or qualification there. There is nothing to indicate that he had even qualified in Connecticut at the time. The will in question is dual in its nature, and any interpretation of its effect upon the land in one state was not necessarily or probably (and certainly not properly) intended to affect the land in the other state. All of which is more clearly shown and sustained in the opinion of the Connecticut Court in this case. (Record p. 19).

—b—

The record of the case in South Carolina as given in the record herein, (p. 14, par. 13) shows that no application was made to that Court for any construction of the will specifically as to the Connecticut land or necessarily with the intent of including that land, neither does its decree expressly include a construction of the will as to that land.

That decision should (and therefore might well) have been intended only to construe the application of the will in the disposition of "all" the land "wheresoever situated" *within the actual control of the Court.* That seems the more probable view of its real intention, when we consider that it contains no reference to or application of Connecticut law, and that it directs an actual conversion of the land by sale and conveyance which it could readily accomplished by its own powers as to the South Carolina land, but clearly could not accomplish as to the land in Connecticut except by the further assistance of the Connecticut Court and Connecticut law. If there is any question at all as to whether the decision was intended to control the disposition of the Connecticut lands, the present writ of error must fail.

Russell vs. Place, 94 U. S., 606, 608.

—c—

There were at least two questions originally involved in the effective construction of Mrs. Clarke's will: Its construction as a will of South Carolina land, and its construction as a will of Connecticut land. The two questions were not the same because the laws of the two states are different.

There were these two distinct questions originally involved, unless the plaintiff in error can successfully claim that a determination that an equitable conversion was intended by the testatrix (as a conclusion by itself, irrespective of its effect) actually accomplishes such a conversion irrespective of the application of any rules of the lex rei sitae determining the sufficiency of the expressions used to accomplish that result; or unless he can successfully claim that South Carolina law can thus finally say what constitutes an effective direction to equitably convert Connecticut lands under the rules prescribed by Connecticut law to control the application of that doctrine in Connecticut.

The plaintiff in error will probably not claim that the South Carolina Court can directly and conclusively determine

the application of the rules of Connecticut law to the disposition of Connecticut lands, whether by way of the construction of a will or otherwise. He certainly cannot make any such claim successfully against the cases elsewhere cited herein as to the jurisdiction of the South Carolina Court.

The determination of an equitable conversion is not the determination of any fact which might be left to a jury, or solely of the meaning of the testatrix, but it is the interpretation of the words used by the testatrix and the determination of the legal effect of those words as so interpreted.

To give the South Carolina decision any effect upon any land it must go far enough to say that the testatrix intended a conversion of the land and sufficiently and properly expressed that intention to effect a conversion under the rules of the controlling law.

And then again, to say that the testratrix intended an equitable conversion, is not sufficient to work such a conversion merely because the controlling laws recognize a doctrine of equitable conversion. The rules governing the application of that doctrine are not necessarily alike in the various states.

"Every state has a right to make its own laws, and its own judicatories are supposed to understand them better than those of a foreign state."

Dougherty vs. Mills, 1 Rich Eq. (S. C.), 335, 339.

The South Carolina Court, the highest authority upon South Carolina law, held regarding Mrs. Clarke's will and the application of the South Carolina doctrine of equitable conversion thereto, that "the provisions of the will as written, when properly construed, develop the conclusion that the testatrix intended that her real property, wheresoever situated and of whatsoever description, should become personalty;" and accordingly decreed as already quoted. That is in effect; that Mrs. Clarke desired an equitable conversion of all her lands and expressed her wishes in proper language to disclose and effectuate them.

While the Connecticut Court, the highest authority upon Connecticut law, held regarding the same will and the Connecticut doctrine of equitable conversion as applicable thereto as follows: (We quote selections from different portions of the opinion.)

> "Equitable conversion results from the existence of a power to convert realty into personalty or personalty into realty, which has not been exercised. There must be both the grant of a power and the imposition of a duty to make use of it." Folio 43.

> "No general residuary devise and bequest can be given such an effect, as respects lands in Connecticut, unless from the whole scheme of the will or the particular language employed, a power of sale is clearly implied. Conversion is effected by sale. Equitable conversion is effected by a power to sell and a duty to sell. It is not enough to manifest an intent that lands shall pass as money, unless there is also, either in terms or by implication, a grant of the means of turning it into money." Folio 49.

> "The question then is no longer simply what wishes the testator has expressed, but whether he has so expressed them as to enable acts to be performed after his decease, by his authority, which will avail to effectuate these wishes according to the requirements of local law. If the will in question worked a conversion, it is because the executor or the trustee could, under its provisions, have executed a deed sufficient under the laws of Connecticut to transfer title to real estate." Folio 50.

> "The heirs-at-law of Julia Clarke are not to be excluded from the inheritance by anything short of a clear implication from the provisions of the will under which her estate was derived. We are unable to find any implication of a power to make such a sale, in favor of Mr. Clarke, either as executor or as trustee." Folio 47.

The plaintiff in error is in the position where he must either admit that the judgment of the South Carolina Court

was limited to a determination of Mrs. Clarke's intention, irrespective of the question of whether or not that intention was properly expressed to accomplish an equitable conversion of Connecticut lands under the rules of law which would govern the application of that doctrine to those lands; or he must claim that the South Carolina Court could by an application of South Carolina law, directly affect the disposition of Connecticut lands. Either position will be equally embarassing to him. Either the questions before the respective Courts were not the same or the South Carolina Court plainly exceeded its jurisdiction.

C.

THE ADJUDICATION OF THE SOUTH CAROLINA COURT WAS NOT WITHIN ITS JURISDICTION AS TO THE NATURE OF THE ACTION, AND AS TO THE RELIEF GRANTED, OR ORDER AND DECREE MADE, AS APPLIED TO THE CONNECTICUT LAND.

The adjudication of the South Carolina Court was not within its jurisdiction so far as it was intended, or is claimed to construe Mrs. Clarke's will in its effect upon the Connecticut land; or to conclusively determine as against Nancy that her mother left only personal estate there.

—a—

Story says in his conflict of Laws:—Sec. 539. "No sovereignity can extend its process beyond its own territorial limits to subject persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity and incapable of binding such persons or property in any other tribunals."

(Cited with approval, Machine Co. vs. Radcliff, 137, U. S. 296).

Sec. 543. "But although every nation may thus rightfully exercise jurisdiction over all persons within its domains, yet we are to understand that in regard

thereto the doctrine applies only to suits purely personal or to suits connected with property within the same sovereignty. For although the person may be within the territorial jurisdiction yet it is by no means true that, in virtue thereof, every sort of suit may there be maintainable against him. A suit cannot for instance be maintainable against him so as absolutely to bind his property situate elsewhere and a fortiori not so as absolutely to bind his rights and titles to immovable property situate elsewhere. It is true that some nations do, in maintaining suits in personam, attempt, indirectly, by their judgments and decrees to bind property situate in other countries, but it is always with the reserve that it binds the person only in their own courts in regard to such property. And certainly there can be no pretence that such judgments or decrees bind the property itself or the rights over it which are established by the laws of the place where it is situate."

Sec. 551. "In respect to immovable property, every attempt of any foreign tribunal to found a jurisdiction over it must from the very nature of the case be utterly nugatory and its decree must be forever incapable of exemption in rem."

Sec. 555. "The grounds upon which the exclusive jurisdiction is maintained over immovable property are the same upon which the sole right to establish, regulate and control the transfer, descent and testamentary disposition of it has been admitted by all nations. The inconveniences of an opposite course would be innumerable, and would subject immovable property to the most distressing conflicts arising from opposing titles, and compel every nation to administer almost all other laws except its own in the ordinary administration of justice."

"It is scarcely necessary to state that in regard to real property, the mode of execution, the *construction*, and the validity of a will must be governed exclusively by the lex rei sitae. The descent of real estate as well as the devise of it, is governed exclusively by the law of the place where the property is situated. It would not comport with the dignity, the independence or the security of any independent State or Nation that these incidents should be liable to be affected, in any manner by

the legislation or the decisions of the Courts of any State or Nation besides itself. This has been a universally recognized rule of the English law from the earliest time, and is so unquestionable, that we should scarcely feel justified in occupying much space in reviewing the cases." I Redfield on Wills 398.

See also: I Jarman on Wills, 1.

"A sovereignty cannot safely permit the title to its land to be determined by a foreign power. Each State has its fundamental policy as to the tenure of land; a policy wrought up in its history, familiar to its population, incorporated in its institutions, suitable to its soil."

Wharton on Conflict of Laws, Sec. 278.

The inquiry, it is laid down, should be; *first*, whether the subject matter was so situated as to be within the lawful control of the State under the authority of which the Court sat; and *secondly*, whether the sovereign authority of that State has conferred on the Court jurisdiction to decide upon the disposition of the property and the Court has acted within its jurisdiction."

Bigelow on Estoppel (1886) p 233.

"The question presented for consideration is, whether the lex loci contractus or the lex loci rei sitae is to govern in the disposal of real estates.

The Court entertain no doubt on the subject; and are clearly of opinion that the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate."

U. S. vs. Crosby 7 Cranch 115, 116.

"It is an acknowledged principle of law, that the title and disposition of real property is exclusively subject to the laws of the Country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another."

McCormick vs. Sullivant 10 Wheaton 192, 202.

"No principle is better established than that the disposition of real estate, whether by deed, descent, or by

any other mode must be governed by the law of the State where the land is situated."

Watkins vs. Holman, 16 Peters 25, 57.

"Her (situs) laws exclusively govern in respect to the rights of the parties, the modes of the transfer, and the solemnities which should accompany them."

"*Communis et recta sententia est, in rebus immobilibus servadum esse jus loci in quo bona sunt sita.*"

Suydam vs. Williamson, 24 How. 427-433.

"It is a principal too firmly established to admit of dispute at this day, that to the law of the state in which the land is situated must we look for the rules which govern its descent, alienation and transfer, and for the *effect* and *construction* of conveyances."

McGoon vs. Seales, 9 Wall, 23, 27.

Approved in Brine vs. Ins. Co., 96 U. S., 627, 636.

DeVaughn vs. Hutchinson, 165 U. S., 566, 570.

"The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted.

It is an established principle of law, everywhere recognized, arising from the necessity by the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated."

U. S. vs. Fox 94, U. S., 315, 320.

"Now in the case of a foreign will devising lands situated in this State is its construction to be governed by the law of the testators domicil, or by that of this state within which the lands devised lie? Laws cannot *proprio vigore* have any extra territorial operation or effect. And in regard to wills of real property, it is well settled by all the authorities, that the construction as

well as the mode of execution and validity of such wills must be governed exclusively by the *lex rei sitae*."

Jennings vs. Jennings, 21 Ohio St., 56, 76.

The same case, in commenting upon the effect of the statute found in so many of the states which makes a will executed according to the law of the place where signed as effectual as if executed according to the laws of the state passing the statute, says p. 79.

"Now if the foreign and the domestic will both stand on the same footing, are both to have the same legal force and efficacy? They must both be subject to the same general law of construction unless the statute provides otherwise. To hold otherwise would be to give an operation and effect to the one which is denied to the other and to make the *construction* and *effect* of the testators will in its operation upon titles to lands in this state depend upon the law of another sovereighty. We cannot believe that such was the intention of the Legislature."

See also Watts vs. Waddle, 6 Peters, 389, 401.

"It is not only the title to real property which is governed by the *lex loci rei sitae* but also the effect and construction of the instrument conveying it."

Butler vs. Green, 65 Hun., 99, 107.

"The appellant is not concluded or affected by the decision of the Probate Court in Connecticut. The transmission of the title to real estate situated in this State, either by testament, by conveyance inter-vivos, or by intestacy, is regulated by our own laws.

Whether the judgments of the Court of Probate in Connecticut are confined to personalty, or assume to determine upon devises of real property, they have no effect upon the title of real estate here."

Peck vs. Carey, 27 N. Y., 9, 11.

"Nothing is better settled than that the law of the place where real and immovable property is situated exclusively governs in respect to the rights of parties and

the modes of transfer and distribution. When the property is real estate the *lex rei sitae* controls."

Smith vs. Smith, 174 Ill., 52, 58.

See also: McGarvey vs. Darnall, 134 Ills., 367, 372.

"The law is well settled that a title to, or interest in lands must be acquired according to the law of the place where the lands are situated. It is that law which determines the force and effect of the instrument, be it a deed, will or contract."

Richardson vs. DeGiverville, 107 Mo., 422, 433.

"Was the title complete to Mr. White according to the laws of Georgia? The laws of Tennessee had nothing to do with it; they could not make it good if it was bad—they cannot make it bad if it be good. If by our law White takes without conditions, the law of Tennessee cannot impose a condition. The land passes according to our law, and this is the necessary incident to the sovereignty of the State over the land within its borders."

Kerr vs. White, 52 Ga., 362, 370.

"Her power of disposition and dealing with it (Mississippi land) are by our laws impressed upon the property itself. As to none of these things has the law of Louisana (the domicile) the slightest influence. * * * The principle of comity does not require a State to regard the laws of any other State so far as they may affect contracts in relation to real estate situated in the former State."

Frierson vs. Williams, 57 Miss., 451, 463.

"According to the maxim extra territorium jus dicenti impune non paretur, it would certainly seem that no sovereignty could claim to bind or change the right to real or any immovable estate lying without its territorial limits, and had therefore no reason to expect that such a decree, if made, would be regarded by the tribunals of the State rei sitae. In short it cannot be treated otherwise than as a mere nullity by those tribunals, consistently with a proper respect for their own authority and

the obligation which they owe to their own severeignty to maintain all its rights unimpaired."

Williams vs. Maus., 6 Watts, Pa., 278, 279.

"The Courts of one States are without jurisdiction over title to lands in another state."

Nelson vs. Potter, 50 N. J., L. 324, 325.

See also:

Lamar vs. Scott, 3 Strob, S. C., 562.
Hawley vs. James, 7 Paige Ch., 213, 219.
Davis vs. Headley, 22 N. J., Eq. 115.
Sedgwick vs. Laflin, 10 Allen, 430, 433.
Brock vs. Frank, 51 Ala., 85, 88.
Danner vs. Brewer, 69 Ala., 191, 203.
Thomas vs. People, 107 Ills., 517, 524, 5.
Cantu vs. Bennett, 39 Texas, 304, 309.
Applegate vs. Smith, 31 Mo., 166.
Elliot vs. Minto, 6 Madd., Ch. 16.
Bovey vs. Smith, 1 Vernon, 84.
Robinson vs. Bland, 2 Burr, 1077, 1079.
Brodie vs. Barry, 2 Ves. & B, 127.
Freke vs. Lord Carberry, L. R., 16 Eq. Cas. 461, 465-6.
Harrison vs. Harrison, L. R. 8 Ch. Appeal Cas. 342.

And especially see the following groups of cases:

Penfield vs. Tower, 1 N. Dak., 216, (1890).
Lee vs. Tower, 124 N. Y., 370, (1891).
In re Towers estate, 49 Minne. 371, (1892).
Three cases concerning the same will.

Hale vs. Hale, 137 Mass., 168, (1884).
Hobson vs. Hale, 95 N. Y., 588, (1884).
Hale vs. Hale, 125 Ill., 399, (1888).
Three cases concerning the same will.

Wurtz vs. Page, 19 N. J., Eq. 365, (1869).
Page's Estate, 75 Penn. St., 87, (1874).
Two cases concerning the same will.

Osburn's Appeal 104 Penn. St., 637, (1883).
McCartney vs. Osburn, 118, Ill., 403, (1886).
McCartney vs. Osburn, 121, Ill., 408, (1887).
Warner's Estate, 130 Penn. St., 365, (1889).
Four cases concerning the same will.

White vs. Howard, 46 N. Y., 144, (1871).
White vs. Howard, 38 Conn., 342, (1871).
Two cases concerning the same will.

—b—

"These cases (referring to the case of Watts vs. Waddle, 6 Pet. 389, cited elsewhere herein and similar cases) rest upon the rule, which is firmly established, that the Courts of one State or Country are without jurisdiction over title to lands in another State or Country. The clause of the Federal Constitution which requires full faith and credit to be given in each State to the records and judicial proceedings of every State is subordinate to this rule, and applies to the records and proceedings of the Courts only so far as they have jurisdiction."

Lindley vs. O'Reilly, 50 N. J. L. 636, 642.

"This is so because the question is one of power, and power is created or withheld by the law of the place where the land lies."

Swank vs. Hufnagle, 111 Ind. 453, 455.

"Courts should not render judgments which cannot be enforced by any process known to the law."

Johnson vs. Mallory 74 Cal. 430, 432.

The judgment of the South Carolina Court, so far as it was intended to affect Connecticut land by determining that the will lawfully directed and empowered the executor to sell and convert that land, was accordingly beyond the power of the South Carolina Court to render, because it was confessedly beyond its power to enforce.

As expressed by the Connecticut Court in its opinion in this case:

> "Courts sit to determine causes and to enforce their determination. It is a general rule that what they cannot enforce they cannot decree. So far as concerns the extra territorial effect of foreign judgments, this rule is a principle of international law." (Folios 38 and 39).

The South Carolina Court had no power to enforce its decree as to the Connecticut lands and hence no jurisdiction over that question.

It is an established proposition that where a Court cannot enforce its decree as to the subject matter concerned, that subject matter is beyond its jurisdiction.

> "The rule is now well established * * which as already explained, forbids a Court to give judgments which it cannot render effective, or which it can render effective only by interfering with the authority of a foreign sovereign or the jurisdiction of a foreign court."
>
> "The undoubted rule in short is, 'that if a Court pronounces a judgment affecting land out of its jurisdiction, the Courts of the country where it is situated, and it is presumed also the Courts of any other country are justified in refusing to be bound by it or to recognize it; and this even if the judgment proceed on the lex loci rei sitae.'"
>
> Dicey on Conflict of Laws (1896) pps. 215, 365.

—c—

The action in South Carolina was brought to determine the effect of the will upon the land of the estate, and not to determine the relations of the parties to each other, or primarily their individual relations to the land, but how the will disposed of the lands. The disposition of the lands was the subject matter of the action and not merly an incident to the settlement of personal rights or relations.

The action was not, so to speak, in personam, to determine any right or demand or claim of one party against the other; or to determine any agreement between them, or to compel right action by one towards the other, or to protect one from the other. This was not a case of election by an heir or widow, or of a power of appointment under a will, or of compelling a party to carry out the views of the Court by an individual conveyance, but it was an action, as it were, in rem—to determine the effect of the will in question upon the lands concerned—to decide how those lands were disposed of by that will.

> "Judgments in rem are adjudications pronounced upon the status of some particular matter by a tribunal having competent authority for the purpose. They decide and determine a status or make a final and conclusive transfer of property."
>
> 1 Bailey on Jurisdiction, Sec. 212, p. 224.

See also:

> Thomas vs. The People, 107 Ill., 517, which seems to regard the administration of a dead man's estate as a proceeding in rem.

The Connecticut lands were not in South Carolina, nor could they be brought there by consent or otherwise. Neither could that Court by any decree or penalty authorize or effect a sale thereof.

> Sometimes: "A Court of Chancery having jurisdiction over the person who has the legal title to lands in another State, may by a decree, force him to convey to the holder of the equitable title, for whom he stands as a trustee; but it cannot by its decree, or through a deed of a Commissioner pass that title."
>
> Watts vs. Waddle, 6 Peters, 389, (Syllabus).

This was not that kind of a case; neither was there any attempt to authorize or direct any one but the executor to make the sale.

In such cases the holder of the legal title is acted upon personally and compelled to give such a deed as the laws of the

situs require. He already has the power to convey under those laws and is simply compelled to exercise that power by the coercion of the foreign state. There can be no question but that the Connecticut Court could pass upon the form and sufficiency of that deed. Were this case in that category of causes there would still be a fatal lack of jurisdiction, in that the executor, the one authorized and directed to sell by the South Carolina Court, did not hold the title to the Connecticut lands, and could not, if he would, convey them unless especially given that title and power under the laws of Connecticut, and whether he has that power and exercises it in due form, is for the Connecticut Courts to decide.

In the one case, the individual already has all needed power to convey under the laws of Connecticut, and whether he acts of his own motion or by pressure from the South Carolina Court does not affect the legality of his action; but in the other case, (which is the one in question here), the only power of sale and conveyance held by the excutor is the one construed for him by the South Carolina Court, while whether or not that power conforms to and is sufficient under the laws of Connecticut, is manifestly for the Courts of Connecticut alone to say.

> "But neither the decree itself, nor any conveyance under it except by the person in whom the title is vested, can operate beyond the jurisdiction of the Court."
>
> Watkins vs. Holman, 16 Peters 25-57.

> "It is not in the power of one State to prescribe the mode by which real property shall be conveyed in another. This principle is too clear to admit of doubt."
>
> Watts vs. Waddle 6 Peters 389-400.

> "The real estate was situated in Tennessee and governed by the law of its situs, and while by means of its power over the person of a party a Court of Equity may in a proper case compel him to act in relation to property not within its jurisdiction, its decree does not oper-

> ate directly upon the property nor affect the title, but is made effectual through the coercion of the defendant, as, for instance, by directing a deed to be executed or cancelled by or in behalf of the party. The Court 'has no inherent power, by the mere force of its decree to annul a deed or to establish a title.'"
>
> Carpenter vs. Strange, 141 U. S. 87, 105.

The South Carolina Court could not by any pressure upon the executor, or by any help from him, accomplish the actual legal transfer of the lands in question. No transfer could be made except by a grantor and a deed authorized to act and approved in form by the laws of Connecticut, and the South Carolina Court could not give that authority or pass upon the sufficiency of an attempt to comply with those laws.

Then again: had this been a proper case for the exercise of a power in personam, and had the South Carolina Court attempted to require the holder of the legal title to dispose of the land in accordance with its decree, that decree would not have bound the Connecticut Court until it had been complied with and the transfer actually made, as it has not been in this case:

> "Until such conveyance or release has been executed, the lien of the mortgage on the immovable property embraced in it, situated in this State, remains unaffected, unless the Court in Ohio was clothed with power enabling it to affect the Status of real estate outside of the State which created the Court, by a decree operating in rem. It is elementary that no sovereignty can extend its process beyond its own territorial limits, to subject persons or property to its judicial decisions. Every attempted exertion of authority of this sort beyond its limits is a mere nullity, incapable of binding such person or property in any other forum. A suit cannot be maintained against a person so as absolutely to bind his property situated in another sovereignty, nor so as absolutely to bind his right and title to immovable property whose situs is elsewhere. * * * *

Indeed no principle is more firmly established than that the disposition of real estate, whether by deed, descent or any other mode, must be governed by the laws of the State where the land is situated."

Lynde vs. C., C. & I. Ry. Co., 57 Fed. Rep. 993, 996.

—d—

But it was strenuously maintained before the Connecticut Court in support of the authority of the South Carolina decision that the subject matter of the South Carolina case was not the disposition of the Connecticut lands but merely the interpretation of Mrs. Clarke's will concerning all of her real estate.

This claim however discloses the same fatal want of jurisdiction, even if the interpretation of the will as a whole is, for the sake of the argument, deemed to be within the power of the South Carolina Court.

The South Carolina judgment attempted to interpret the will and to adjudge that it specifically authorized and directed the sale and conversion of the lands concerned. If this was a direct attempt to both ascertain the wishes of the testatrix and decide that the will gave a sufficient power and authority to carry out those wishes as to theCon necticut lands, it was a direct disposition of those lands by the South Carolina Court and therefore clearly beyond the jurisdiction of that Court under the cases already cited; while, if the judgment was merely an attempt to ascertain the wishes of the testatrix—merely a determination that she desired a conversion of the lands, and intended to authorize and empower the executor to sell them for that purpose—the judgment did not bar the further consideration by the Connecticut Court of the sufficiency of the language used to carry out those wishes, any more than an express power and order in the will to the executor to sell and convey would have barred the Connecticut Court from determining its sufficiency there. The executor did not hold the title and the judgment could not be carried out, unless, as in the case of a conveyance or deed by the executor, the power of sale was

authorized by, and sufficient under, the laws of Connecticut, as determined by the Courts of Connecticut.

Any attempt to support the South Carolina decision as to Connecticut lands, by claiming that it merely determined the interpretation of the will, either goes too far or not far enough to be in effect a conclusive determination of the disposition of those lands.

The very term "Equitable Conversion" which is admittedly applicable to the result, which the South Carolina Court attempted to accomplish, shows that that result includes more than a mere discovery of the wishes of the testatrix. It shows that a court of Equity has still to apply its rules to the form of words which clothe those wishes and determine what they effect.

Then again, the interpretation of the will was not the question at issue in the South Carolina case except as it affected the rights of the parties to some specific property. A mere interpretation of a will could not be a cause of action or the subject matter of an action by itself. Such an interpretation can be considered only in connection with and to determine the rights of parties to some property in question; and no judgment would be complete or effective unless it determined those rights.

> "We have already stated that the Pennsylvania assets stand unaffected and will only add that the assumption that a complainant or plaintiff is estopped by a judgment against him from introducing evidence in a second suit and in another country for other property on the ground that the fact of title had been adjudged and concluded by a former judgment or decree, *thus separating the title from the property*, is an abstract proposition inconsistent with the due administration of justice and not recognized in our system of jurisprudence or that of Great Britain and is aside from any question affecting the comity of Nations."
>
> Aspden vs. Nixon, 4 How., 467, 499.

The disposal of the South Carolina lands was a material part of the question before that Court; and either the disposal of

the Connecticut lands was likewise a part of the question or they were not intended to be controlled thereby. If it is claimed that a construction as to the South Carolina lands must be conclusive in all jurisdictions as to the lands situated in those jurisdictions as well, it will be needful for the plaintiff in error to further claim that the South Carolina Court can conclusively determine, under its own laws, the legal effect of a testators expression concerning Connecticut lands, which under the rules and precedents already referred to is quite beyond its power to determine or enforce.

Even if we should consider, for the sake of the argument, that the Court of the domicil may conclusively interpret a will, it appears that the South Carolina Court in this case passed the limits of every power of interpretation and after declaring what seemed to it to be the wish of the testatrix, attempted to further judicially construe the effect upon the Connecticut land of the words in which that wish was clothed—that is; 1st, to determine or interpret the testator's wishes; and 2d, to give the expression of those wishes the legal effect upon Connecticut lands which the Court of South Carolina thought it ought to have. An attempted construction which is a very different thing from interpretation, and quite beyond the jurisdiction of any foreign Court.

> As said by the Connecticut Court in the case of Glover vs. Stillson, 56 Conn., 318. "There are two methods of construing wills: One is to ascertain the intention of the testator and give effect to that so far as it is consistent with the policy of the law." * *
>
> "The other is to apply legal rules and construe the language used accordingly."

If, as appears in this case, the South Carolina Court applied the legal rules governing its own decisions and construed the language of the will accordingly, it clearly exceeded its jurisdiction, so far as the Connecticut lands were concerned, by attempting, not a discovery of the wishes which prompted the

language used, but a construction of the legal effect of that language on Connecticut lands under South Carolina law.

If the Court of South Carolina is given the most liberal powers, of interpretation accorded anywhere, it could only *interpret* in the limited sense referred to; it could not import such a construction as it attempted to enforce.

> "Interpretation properly precedes construction, but it does not go beyond the written text. Construction takes place where texts to be interpreted and construed are to be reconciled with the rules of law, or with compacts or constitutions of superior authority, or where we reason from the aim or object of an instrument, or determine its application to cases unforseen and unprovided for."
>
> 2 Parsons on Contracts, 491 (a).

> "Interpretation differs from construction in that the former is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey; and of enabling others to deprive from them the same idea which the author intended to convey.
>
> "Construction, on the other hand, is the drawing of conclusions respecting subjects that lie beyond the direct expressions of the text, from elements known from and given in the text; conclusions which are in the spirit, though not within the letter of the text."
>
> Cooley, Constitutional Limitations, 6 Ed. p. 51.

> "The office of interpretation is to bring sense *out of* the words used, and not bring a sense *into them*."
>
> McClusky vs. Cromwell, 11 N. Y., 593, 602.

The question is not; 'what is the meaning of any local reference? Or, 'with whom was the contract made?' Or even, 'what property is referred to?' 'But, how does the language used affect Connecticut lands?', 'What interest in legal effect, does it dispose of therein?'

By Mrs. Clarke's will, her trustee was at the time stated to pay over the whole sum to Nancy, or if she married, one-half of her share was to be paid to her then, and the other half at the time first stated.

Assuming that the South Carolina Court could even go so far as to say that Mrs. Clarke meant by "the whole sum," all of Nancy's share, and by "to pay," a transfer of that share, and in using the words "pay" and "sum" had in mind personal property, that nevertheless falls far short of giving that court power to say that the language used effected an out and out conversion immediately upon her death of all her property in every state—as well that given her husband at once as the shares to be transferred to Nancy and Julia long afterwards—and thus to fetter the Connecticut Courts by a conclusive determination which they must recognize and enforce in spite of its remarkable character and entire repugnance to Connecticut rules of construction.

The contention is, that it was of no moment whether such an out and out conversion was fairly and properly implied or whether such a conversion would be implied under the South Carolina law from less imperative and unequivocal expressions than in Connecticut, but that the Connecticut Court must now agree that such a conversion was sufficiently and imperatively directed by the language of the will to satisfy its rules.

The Connecticut Court could require apt words of meaning and its own form of conveyance in any transfer of that property by sale inter vivos. Yet it was asked to enforce in this case, with its eyes closed, the decision of the South Carolina Court that Mrs. Clarke's language meant and conclusively required a sale and conversion of all her real estate.

If a power of sale had been actually expressed in the will, could not the Connecticut Court pass upon the sufficiency of that power of sale as so expressed? Would it have to accept the opinion of the South Carolina Court as to such sufficiency.

And may not the Connecticut Court determine the sufficiency of the power of sale in this case, where it exists if at all by implication only?

The Court of South Carolina could not take jurisdiction of a will for the purpose of determining whether an expressed power of sale of Connecticut lands was properly worded, whether it did this by way of determining the testator's intention or to directly transfer the land.

Suppose the South Carolina Court had held that Mrs. Clarke intended Julia's share should not vest until she was twenty-five, and that as she had died sooner it would go to the survivor, Nancy; or, (if the words per capita had been omitted), that the devise to the husband and the two children equally, was intended as a devise otherwise than per capita; or, if the estate had been left to the husband during his life, with power to use the principal if he deemed it needful for his support, with remainder of balance over to the children, that it was intended as a devise in fee to the husband; and suppose the Connecticut Court applying its own law would determine in the respective cases; that the share vested in Julia at her mother's death, that the division was intended to be per capita, and that it was intended the husband should take a life estate only, with a limited power of application of the principal; would the Connecticut Court be confined to an execution of these South Carolina decisions as to the Connecticut lands, with no power to exercise its own judgment in the premises? Yet these would be as truly questions of interpretation as is the question: Did Mrs. Clarke, by the language she used, intend and properly direct an immediate out and out conversion and sale of her whole estate?

Then again, if the South Carolina Court may take jurisdiction to interpret a will of Connecticut lands, and in effect conclusively order a sale of those lands, we might easily have this impossible situation: There might have been other children in the case, residents of Connecticut, who were not before the South Carolina Court, and the executor might be bound under the South Carolina decision to sell all of the Connecticut lands and distribute the proceeds, and might be required to do so by the parties before that Court, while he would be equally required by the Connecticut decision and the parties there, to

enforce a distribution of the land itself. It would be difficult to enforce both decisions or to make an equal distribution to all the heirs under such circumstances.

There can be no doubt, under the authorities, but that it is for the Court of the situs to say whether or not a general devise includes the after required real estate. And yet the implication here of an out and out conversion, was no more truly than that a question of the meaning and intent of the testatrix. The language in each case might be construed either way; it is the law which gives it its especial intent and force.

Must the Connecticut Court confine itself to giving effect to an "*intent*" imputed by the South Carolina Court under South Carolina law.

It is permissable to admit parole evidence to clear up latent ambiguities as to the persons or things referred to in a will, but it has always been deemed improper to admit such evidence to amplify or qualify or explain the legal effect intended by the testator for the language used.

And in the same way, if the Courts of other States are permitted to imply or impute or construe the legal effect intended to be acomplished by the language used in a will, or are permitted to add to that language so as to make it express what those Courts conclude under their construction the testatrix wished to accomplish, there would be very little control left to the Connecticut Courts over the Connecticut lands owned by non-residents.

Would the plaintiff in error claim that the South Carolina Court has jurisdiction to determine whether a will has been properly executed under the Connecticut law so as to pass lands in Connecticut? How different in principle would this be from trying to determine the construction of a will of Connecticut lands; or that a sale and conversion of the Connecticut lands is imperatively directed in the will?

Is a state more concerned with the execution and proof of a foreign deed or will than with the interpretation and construction of its provisions?

The form cannot be of more importance than the substance, or more intimately concern the sovereignity and control of the State.

If a resident of Connecticut were to make his will in South Carolina, the Connecticut Court might admit evidence of his surroundings in explanation of the meaning of his words, but certainly would not permit such an importation of construction by the South Carolina Court as is claimed in this case.

If a resident of South Carolina should give a fellow citizen a single deed embracing two tracts of land, one in South Carolina and one in Connecticut, without any words of inheritance, and if in an action brought by the grantee involving the construction of the deed, a Court there should hold that it was intended to and did convey a fee in both parcels, would that judgment bind the heirs or attaching creditors of the grantor, or even the grantor himself in Connecticut, as to the Connecticut land, even if the parties in the two cases were the same or their privies in title. Could the South Carolina Court conclusively determine that the deed intended to and did convey the fee of the Connecticut lands?

In the case at bar the South Carolina judgment does not act or pretend to act upon Nancy Clarke personally; it does not bid her to do or refrain from doing anything; it simply says that certain lands in several states, including Connecticut, (which lands in Connecticut would otherwise go to her.) were intended by the testatrix to be sold and converted into personalty, and that the executor is empowered to so sell and convert them, despite the fact that there is no such power in the will under the Connecticut law.

The two cases above are analogous. Neither acts upon the person, but both determine directly by a South Carolina Court and South Carolina law, the title to Connecticut land.

How can this conclusion of the South Carolina Court as to the Connecticut land be within its jurisdiction, in either case?

The language of the will is not a peculiar form of South Carolina English, but general every day English such as we

all use; nor are there any latent ambiguities requiring local light for their elucidation. The construction which the plaintiff in error claims to have established for the will is merely a determination of the effect under the common law of those words wherever and by whomsoever used.

There is a very great difference between interpreting a provision by reference to terms or idioms of local significance, or even by reference to a local construction of expressions which have acquired a settled and well understood meaning under local law, and interpreting that provision by rules of local construction applied for the first time to the expression used.

The question here was not even whether Mrs. Clarke's expression had a settled and well understood meaning in South Carolina which we might suppose she knew and therefore used the words with that in mind, but whether the South Carolina Court meeting these expressions in such a connection for the first time, could conclusively determine their legal effect from what it concluded the South Carolina law was or should be. It cannot be claimed that the South Carolina precedents were sufficiently in point to demonstrate Mrs. Clarke's actual meaning when her will was made. No reasonable person wishing to direct an out and out conversion would have risked it with such expressions under any of the South Carolina precedents then existing.

A principal reason given for the claim of the plaintiff in error is, that a will should bear the same interpretation everywhere, and that that interpretation should be based upon the local surroundings of the testator. It would certainly be more convenient if the laws of all the States were alike; but until they are, a testator must either use words of conveyance appropriate at the situs, or the muniments of title in each State must be subject to as many varying constructions as there are different state laws, to the utter confusion of our records and the despair of those concerned.

If it were so that there can lawfully be but one construction of a will, that ought to be by the laws of the domicil, (if

there is any reason for the rule,) and it should make no difference whether the Courts of the domicil acted first or not. Accordingly the Connecticut Courts would have to apply the laws of other States in determining the effect of all foreign conveyances of Connecticut lands, and conveyancers and counsel must needs become prodigies of learning.

Besides the utter subversion of local control over Connecticut lands, such a course would soon spread confusion among all the titles in the State. It would seem as though it were far better to insist upon the testator's learning something of the laws under which he holds his lands, and upon his disposing of them under their local conditions, just as he would adapt any buildings on them to their local surroundings.

The testator knows his lands are situated in different States which are independent sovereignties, and he certainly ought to know that their laws are different. One of the first things an owner realizes is the difference in governmental control. He knows those lands are not within his home surroundings or subject to the taxes, customs or control of his domicil. He knows he is not describing local persons or things, but is disposing of lands which are in different governments, and he must be presumed to have made his dispositions with reference to the laws of those governments. Even the South Carolina Court said that Mrs. Clarke must be presumed to have known what the laws of Connecticut were.

If a testator tries to make one disposition answer for lands in several States, he must see to it that the language used is sufficient and appropriate to accomplish his purposes in each of those States.

If it be objected that an inequality of benefits may result to the beneficiaries of the estate under the different laws, and so the intention of the testator be frustrated, that would be his own fault, and a lesser evil besides. He should either know something about his property, or bring it all under his wing. It is inevitable that properties differently situated, even in the same State, should be subject to different laws, burdens, obligations and relations.

No one will pretend to say that intestate lands are to be distributed according to the laws of a foreign domicil. Yet such distribution is in effect but a will by the State for the owner, and will cause the same inequality of benefits, no matter how well satisfied the owner was with the rule of his domicil or how fully he believed his lands would descend thereunder.

A testator, in disposing of his lands in other States, knows that he is disposing of an immovable part of another government, and should be required to act accordingly or abide the result.

As said in Bispham on Equity, 1 Ed. Sec. 312: "The question' (of conversion as in this case), 'always is, did the testator intend to give money or to give land, and has that intention been *sufficiently expressed.*" This means "sufficiently expressed" *under the laws of the situs*, and while the high character of the South Carolina Court would make its decision upon that point persuasive, it could not be conclusive

Then again, there is no common law right of transmission by will. A will is a statutory conveyance permitted and effective only by the express consent of the State concerned. It is for that State alone to say whether its land shall pass by will; how such wills shall be executed and proved, and, (as a necessary corollary), what force and effect shall be given to their language. The fact that the lands of two States are disposed of by the same testamentary provision, cannot give any greater jurisdiction or control to one State over the land in another, than it would have, had the provision affected only the foreign land; and it seems to be a self evident truth, that both the independent sovereignty of the State over its own lands, and its independent control of their transmission by will, give it an exclusive power to determine the legal effect of every such attempted transfer.

Here again we quote from the opinion of the Connecticut Court in the case at bar. (p. 29, folio 40).

> "Upon the death of a land owner, whether a citizen of the State or not, whoever takes title by succession,

takes it because these laws concede it to him, not as a right but as a privilege. (Citing in support, Mager vs. Grima 8 How. 490). * * * * * a devisee takes by an artificial perpetuation of a testator's will, which survives him for that purpose with a vitality conferred and created by positive law. By that same law the form of its expression is prescribed and limited. Title to land can be conveyed under a testamentary power, only when such a conveyance is sufficient under the laws of the territorial sovereign."

The leading case of Birtwhistle vs. Vardill 7 Clark and Finelly 895, cited by the Conn. Court, was twice argued at length in the House of Lords between 1830 and 1840, and finally unanimously decided. It holds that a child born out of wedlock in Scotland of Scotch parents and subsequently legitimitized by Scotch law cannot take as heir the land of its father in England. That is to say, a person declared by the law of the domicil to be a legitimate child does not necessarily take what legitimate children take in England.

Had it been possible for the South Carolina Court to take jurisdiction of the will as to the Connecticut lands it could have done so only through jurisdiction of the parties. While it may have taken jurisdiction of the parties properly as to the South Carolina lands, it could not have taken or continued that jurisdiction as to the Connecticut lands unless by consent, and an infant cannot subject to any tribunal her rights of property by consent.

The element of consent would have been necessary to bind the parties as to the Connecticut land and the infant could not give any such consent.

"It has been settled by the decisions of this Court * * * that an infant is incapable of making himself a party to an action by accepting service of a summons so as to be bound by a judgment therein."

Whitesides vs. Barber 24 S. C. 373. (376).

And even if Nancy Clarke could have lawfully consented to the action taken, the Connecticut Court might properly refuse to be bound thereby because of the considerations of public policy involved.

> "No man can put himself in the place of the sovereign and make the adjudication of a Court valid by ratifying an unauthorized exercise of power by its agent, when the law of the land, which is the agents power of attorney, declares that the Court has no authority to render the judgment."
>
> Springer vs. Shavender 118 N. C. 33, 45, (1896).

> "If a State provides that no title shall pass to property within its borders except on certain conditions, such provision cannot be over-ridden by the law of another State which parties domiciled there may be held to have adopted."
>
> Cole vs. Cunningham, 133 U. S., 107, 128.

State sovereignty and state rights are no more jealously or zealously guarded in Connecticut than in South Carolina, as the recent past has abundantly shown; neither can it be said that Connecticut yields less readily or less fully to the limitations of the Federal compact; but in the disposition of the land which is its birth right, Connecticut has never yielded to any state or compact any power or right whatsoever, whether the attempt was made to directly interfere, or, by construction to create a title which should be recognized by Connecticut law.

V.

SOME CONSIDERATIONS WHICH WOULD BE PERTINENT IF THE PROPERTY WERE IN FACT PERSONALTY.

The decree of the Connecticut Court of Probate, (p. 7, folio 20) shows that that Court considered (1) the inventory as filed, (2) the will of the mother, and (3) the South Carolina decis-

ion. As already stated there is nothing to indicate that that decision was claimed to work an estoppel under the Federal Constitution, or to be anything more than a precedent for a similar construction of the will by the Connecticut Court. Moreover, as already shown, (p. 4 of this brief) that Probate decree is still the fundamental and only adjudication determining how Julia Clarke's estate in Connecticut shall be distributed. While it is of course a fair inference that the Probate Court rejected the South Carolina precedent and held that the real estate remained unconverted and accordingly "ascertained" Nancy to be the only heir, still if the property had been in fact personalty and that personalty were to be distributed by the law of the situs, Nancy would have taken it just the same.

The Connecticut statute controlling the distribution of property, both real and personal, is as follows:

> "If there be no children or any legal representatives of them then after the portion of the husband or wife, if any, is distributed or set out, the residue of the estate shall be distributed equally to the brothers and sisters of the intestate of the whole blood and those who legally represent them."
>
> Gen. Stats. (1888) Sec. 632.

Now we claim that a Connecticut Probate Court has the power, if it chooses so to do, to order the distribution of a non-resident intestate's personalty situated in that State according to the Connecticut Statute of distribution.

> "Every State and Sovereignty possesses the power of regulating the manner and term upon which property, real or personal within its dominion may be transmitted by last will and testament or by inheritance and of prescribing who shall, and who shall not be capable of taking it."
>
> Mager vs. Grima, 8 How. 490, 493.

> "There is no little conflict of authority on the general question as to how far the transfer of personal property

by assignment or sale made in the country of the domicil of the owner will be held to be valid in the Courts of the Country where the property is situated when these are in different sovereignties.

The learned author of the commentaries on the Conflict of Laws has discussed the subject with his usual exhaustive research and it may be conceded that *as a question of comity*, the weight of his authority is in favor of the proposition that such transfers will generally be respected by the Courts of the Country where the property is located although the mode of transfer may be different from that prescribed by local law. * * * * * But after all this is a *mere principle of comity* which must give way when the statutes of the country where property is situated or the established policy of its laws prescribe to its courts a different rule."

Green vs. Van Buskirk 5 Wall 307, 311. (See this case at length).

"Any other rule would destroy all safety in derivative titles and deny to a State the power to regulate the transfer of personal property within its limits and to subject such property to legal proceedings."

Green vs. Van Buskirk 7 Wall 139, 148.

"Undoubtedly the fiction of law that the domicil draws to it the personal estate of the owner wherever it may happen to be yields whenever it is necessary for the purposes of justice that the actual situs of the thing should be examined and always yields when the laws and policy of the State where the property is located invalidate a transfer even though valid by the law of the assignor's domicil in which State it was made."

Cole vs. Cunningham 133 U. S. 107, 128.

It accordingly seems to us worth while to consider whether the Probate Court did not make an order which in any event it had the *actual power* to make whatever the nature of the property in question and however lacking in comity the order might be. If this be so, who shall say that the Probate Court was uninfluenced by that consideration, and why should its order be now disturbed?

We know of no provision of the Constitution which requires the State of Connecticut to distribute any property within its borders under any other than its own laws of distribution as determined by its own Courts, even if every principal of inter-state comity be thereby violated.

VI.

CONCERNING SOME OF THE AUTHORITIES RELIED ON BY THE PLAINTIFF IN ERROR.

The plaintiff in error has not heretofore cited authorities in support of a contention that the parties and the questions were the same in the South Carolina and Connecticut cases. We accordingly cannot anticipate and consider the authorities which he may cite upon those points.

He has however cited authorities in support of the contention that a will, whether of real or personal property, is to be construed by the law of the domicil. In as much as it will doubtless be claimed that these authorities show that the South Carolina Court had jurisdiction to determine the effect of Mrs. Clarke's will upon Connecticut land, we will briefly consider them by way of anticipation Some of them are also referred to and distinguished in the opinion of the Connecticut Court,

1. 2 Greenleaf on Evidence, 13 Ed., Sec. 671.

> "In the interpretation of wills, whether of movable or immovable property, where the object is merely to ascertain the meaning and intent of the testator, if the will is made at the place of his domicile, the general rule of the common law is, that it is to be interpreted by the law of that place at the time when the will was made. * * * Recourse is to be had to the law of the place where the will was made and the testator domiciled." (Citing as its authority Story on Conflict of Laws next below).

"Where the will of personal property is made in the domicile of the testator, the general rule of the common law is, that it is to be construed according to the law of the place of the domicile in which it is made.

The same rules of construction will generally apply to wills and testaments of immovable property, unless indeed it can clearly be gathered from the terms used in the will, that the testator had in view the law of the place of the situs, or used other languages which necessarily referred to the usages and customs or language appropriate only to that situs."

Story on Conflict of Laws, sec. 479 a, h.

Both of these authors thus refer the interpretation and construction of the will to the law of the place where the will *was made* and the testator domiciled. But Mrs. Clarke's will was made in Bridgeport, Connecticut, where the bulk of her estate was situated, and where she had just derived all of her rights thereto under a Connecticut will and Connecticut laws, from her grandfather, a resident of Bridgeport. Moreover her will was made under the advice and with the assistance of Connecticut counsel. It is a fair presumption at least, that it was made with especial reference to Connecticut laws and the disposition of her Connecticut land thereunder.

"For purposes of construction it is always legitimate to consider the time when, and the circumstances in which the will was made, and we think the law under which it was made is one of those circumstances."

State vs. Atkinson, 144 Mass. 564, 569.

Approved in Mullen vs. Reed, 64 Conn., 240, 247.

And we also add from a later authority on the conflict of laws:

"It is said by Judge Story (479 h) that the same rules of construction [concerning wills of personalty] 'apply to wills and testaments of immovable property; unless indeed it can be clearly gathered from the terms used in the will that the testator had in view the law of the

> place of situs or used other language which necessarily referred to the usages and customs or language appropriate only to that situs,' But this is scarcely reconcilable with the general position that in respect to immovables the law of the situs controls.
>
> That law may say: 'It appears from the structure of the will that the testator wished to apply the law of his domicile,' and the law of the situs may for this purpose adopt the law of the domicile, or on similar reasoning the lex loci actus, or the law of the testator's temporary as distinguished from that of his last domicile. But this will be at the election of the Courts of the situs. The law that they impose must be decisive."
>
> Wharton on Conflict of Laws, Sec. 597.

It will also be noticed that the two authors above (Greenleaf and Story), do not use the same words to convey their meaning, and there is therefore with them the same confusing indefinitness as to the application of their suggested qualification of the rule which will be met with in the expressions elsewhere found upon the same point.

Greenleaf says, (though he seems to refer to Judge Story as his authority), that in *the interpretation* of wills of real estate, the law of the domicile governs "where the object is merely to ascertain the meaning and intent of the testator," while Judge Story refers the *construction* of such a will to the law of the domicile.

There is a vital difference between *interpretation* and *construction* in such a connection, and the power of even interpretation is itself limited by Greenleaf.

These expressions still leave it uncertain as to what Messrs. Greenleaf and Story really meant by *interpreting* or *construing* a will by the law of the domicile; whether it is a limited or a general power of interpretation and construction—whether it is limited to ascertaining the meaning of the testator from certain words used by him which have a peculiar local color, or includes a construction of the legal effect of ordinary language, (as to the character and extent of the estates created by it) which will have universal application.

The deficiencies of the English language are well illustrated in this case. The words might mean much; they probably mean very little.

The other more specific quotations from and references to Judge Story's views concerning foreign control of local lands, given on p. 23-24 of this brief, show that he at least did not intend by his above expression to approve the comprehensive power of construction claimed by the plaintiff in error.

2. **Ford vs. Ford,** 70 Wis, 19; **Ford vs. Ford,** 80 Mich. 42. Two cases concerning the same will and estate, construing the effect upon lands in Wisconsin (the domicile) and Michigan of the following provision: "I direct that all properties in Schedule A attached to this instrument and bearing my signature, (which described the lands in question), shall be converted as soon as practicable after my decease, into good, rentable, inside property in Kansas City, Mo., at schedule prices, or as much better as may be."

The Wisconsin Court, as the Court of the domicile, interpreted the above provision as intending an equitable conversion, but added, (p. 51).

> "What has been thus said is not by way of determining the validity of the title to any lands outside of Wisconsin, nor the validity of any investment or trust in or tenure of such lands, but merely to ascertain the meaning and intent of the testator from the language employed in the will, which, as we have seen, is a duty devolving upon this jurisdiction."

The Wisconsin Court further explained its meaning at a *second* hearing of the same case (Ford vs. Ford, 72 Wis., 621), saying then in part, (p. 624) in explaining its former opinion above:

> " '*That the language so used works an equitable conversion of the lands in said States of Kansas and Michigan into lands in Kansas City, Missouri.*' * * * * * * * * The words in italics (those quoted) standing alone would be an attempt to adjudicate upon matters which this Court

repeatedly disclaimed any purpose of determining, and hence remitted the same to other rightful jurisdictions. 70 Wis., 44, 50-1, 62-69. By a careful reading of the passage quoted it will be observed that the words in italics are inserted as a mere paraphrase of the words which precede them which merely declare what the 'testator *intended* from the language used.' The words in italics, therefore, must be regarded merely as another way of stating what the 'testator *intended*' by the use of the language employed. Besides they are immediately followed by other words which expressly declared that no attempt is thereby 'made to determine the validity of the title to any lands outside of Wisconsin, nor the validity of any investment or trust in or tenure of such lands, but merely to ascertain the *meaning* and *intent* of the testator from the language employed in the will.' * * * * * (p. 627). On the other hand should the Courts of Michigan or Kansas hold the will or the proposed conversion of the lands therein situated, to be invalid then they would pass out from under the operation of the will and never become subject to the trust."

The Court goes on to say, (p. 628) that its judgment must be regarded as "leaving open for further action the questions as to the validity of such conversions, suspensions and accumulations, until authoratively determined by the rightful jurisdiction, as required by the mandate of this Court on the former appeal. In order to pass intelligently upon the questions presented relative to the personal property and lands in this State, it became necessary upon the former appeal to construe the will as a whole in order to discover the nature, extent and duration of the trust imposed. This was done, 70 Wis., 46-48, 49-50, 51-53, 53-62. Such construction is followed in the opinion by a disclaimer of authority to determine the legality of such trust—except as to the lands in Wisconsin,—and the other matters left open in the opinion as above indicated. 70 Wis., 62-69. What is said in the judgment here appealed from in respect to the nature, extent and duration of such trust, and the respective rights of the several beneficiaries thereunder, must be regarded as held open and subject to determination by the rightful jurisdictions, as indicated in that opinion.

In fact the judgment is mostly provisional, and does leave open the validity of such trusts, conversions, suspensions and accumulations until authoratively determined by the rightful jurisdictions. This appears from what has already been quoted therefrom and other passages which might be quoted."

The Michigan Court subsequently considered the same provisions of the will and in the course of its opinion says: (p. 50.)

"In our view of the case, the question does not become one of much importance, but we think the law well settled that the meaning and intent of the testator having been settled by the domiciliary Court, the Courts in foreign States and Countries will be *guided* by such construction, unless it can be clarly gathered from the terms used in the will that the testator had in mind the law of the place of the situs or used language necessarily referring to the usages and appropriate only to the situs.'

* * * * *

(p. 51.) "Aside from these considerations, however, we are satisfied that it was the intention of the testator, as indicated by the terms of the will, to give to his executors the absolute power to sell and convey the Michigan lands, and this without condition or limitations."

* * * * *

(p. 52) "The true intent and meaning of the testator having thus been ascertained as far as relates to his Michigan lands, it is now important to ascertain *what effect* the will has upon these lands, and how far the executor may proceed in their disposition. The direction that the exchange should be made is imperative and, as we have seen, without condition. Equity must therefore consider that done which the testator lawfully directed, unless such disposition is unlawful, or as counsel contend affected by our statutes against perpetuites which we shall consider further on. *We have no doubt that this equitable conversion was effected by the terms of the will.*"

It will thus be seen that while the Michigan Court expressed a willingness to be "guided" (not controlled) by the Wisconsin Court in ascertaining the *meaning* and *intent* of the

testator, it nevertheless took it for granted that it was its own right and duty "*to ascertain what effect the will* (so interpreted) *has upon these lands, and how far the executor may proceed in their disposition*"; and then apparently to assure itself that it might safely yield to a Wisconsin interpretation even of the meaning, it also proceeded to construe the will for itself and determined after an independent examination, that the Wisconsin interpretation was right, and "*We* (Michigan) *have no doubt that this equitable conversion was effected by the terms of the will.*"

And the very recent Wisconsin case of Frame vs. Thormann, 102 Wis., 653, (1899) likewise shows that in neither of those two states was there any intention of yielding to the other, the power to construe the *effect* of a testamentary disposition of local lands, or rather, as it is termed, to determine the "*validity*" of the disposition, to accomplish the imputed intent. Quoting from that case, p. 669:

> "The Courts of Wisconsin are, of course, bound to give full faith and credit to the public acts, records, and judicial proceedings in Louisiana, as well as every other State in the Union. Const. of U. S. art. IV, Sec. 1. * * * * So it (Wis. Court), has gone so far as to hold that where a resident of Wisconsin, owning lands in other states, makes a will disposing of all his property, the validity of the will, so far as such lands were concerned, must be left to the courts of the states respectively, where such lands were situated. Ford vs. Ford, 70 Wis., 19; S. C. 72 Wis., 621. In that case it was held, as the settled doctrine, supported by numerous adjudications, that the validity of every disposition of real estate by will must be governed by the law of the place where the land is situated, and that the validity of every disposition of personal property by will must be governed by the law of the testator's domicile at the time of his death. 70 Wis., 44, 45. It was also held in that case that where such will directed the personal assets to be invested in lands in another State, the validity of such investments must be left to the courts of such other state. Such rules were followed in such other states. Ford vs. Ford, 80 Mich., 42; Robertson vs. Pickrell,

109 U. S., 608. These cases are cited to show that it has been and is the settled purpose of this Court to give full faith and credit to the public acts, records and judicial proceedings of other states. But to entitle a judgment in a court of another state to such full faith and credit in an action or proceeding *in rem*, like the case at bar, it must appear from the record thereof that the court rendering the same had jurisdiction of the subject matter of the action or proceeding."

The cases refered to in the Michigan opinion above (80 Mich., 47) have been cited by the Plaintiff in error and are referred to hereafter. The case of Ford vs. Ford itself together with Gueard vs. Gueard are cited in a paragraph in Dicey on Conflict of Laws American Notes (1896) in a connection which throws light upon the situation. The author of the notes having stated (p. 528) that:

"Generally speaking, all questions touching the validity, construction and effect of wills relating to immovables are determined by the lex situs."

He goes on to say:

"But the Court of the situs, may, in determining the *meaning* intended to be conveyed by certain words, infer such a meaning from the sense attached to them by the law of the State in which the will was made." (citing those two cases).

Even here, moreover, the local meaning to be sought after is described as that of the place where the will was drawn, (in this case, Connecticut), and not the place of the domicil.

3. Trotter vs. Trotter, 4 Bligh, N. S. 502, (1818) concerned an English will of personalty and Scotch heritable bonds (realty). The will was conceded to be invalid under the laws of Scotland, because defectively executed, and the heritable bonds there went to the heir. The will was valid as an English will of personalty, and the question was whether the scheme or intent of the will was such that the heir, in claiming the personalty under the will, ought in equity to be compelled

to elect between the will and his rights as heir, so far as he would obtain an unfair advantage by taking both.

The Court was concerned solely as to the disposition of the personalty, and, as affecting that, had to determine the intent of the will as to the Scotch realty; not in the least to affect the title or rights to that realty, but only to decide what proportion of personalty in England the heir might equitably take under the will. All rights in the Scotch realty had already been determined or conceded, and were in no way affected by the English interpretation, which concerned the personalty alone.

The Court said in part, p. 509:

> "If I am asked to conjecture what his intention was I have no hesitation in saying that I should conjecture that it was his intention to give the real property, but, there is not such expression of intention on the face of the will as, I think, can justify your lordships in giving it that effect. It is nothing more than conjecture; the intention is not expressed as it ought to be for the purpose of raising an election."

The above is doubtless an authority for us as to what is a *sufficient expression* of intention, whoever interprets it, but it does not support the appellant's claim that the South Carolina Court may construe the will so as to directly affect the Connecticut lands.

4. **Maxwell vs. Maxwell,** 2 De. G. M. & G. 705, (1852), and **Orrell vs. Orrell,** L. R. 6 Ch. 302, add nothing to the force of Trotter vs. Trotter (above).

The later case of Lloyd vs. Guibert, 1 Q. B. 115, (1865), says in part, (p. 122):

> "In the diversity or conflict of laws, which ought to prevail, is a question that has called forth an amazing amount of ingenuity and many differences of opinion. It is, however, generally agreed that the law of the place where the contract is made, is prima facie, that which the parties intended, or ought to be presumed to

> have adopted as the footing upon which they dealt, and that such law ought therefore to prevail *in the absence* of circumstances indicating a different intention, *as for instance:* That the contract is to be entirely performed elsewhere, *or that the subject matter is immovable property situate in another country* and so forth."

And the Scotch case of Fenton vs. Livingston, 3 Marcq. App. Cas. 497, (1859), speaks in no uncertain way of the prerogatives of the Court of the Situs: Per Lord Wensleydale, p. 548.

> "Though there have been questions perhaps not difficult to decide as to the capacity to convey and the form of conveyance where the country of the domicile and that of the estate differ, it is fully established that the law of the country in which the property is situate governs exclusively as to the tenure, the title and the descent of such property."

Our view of the actual application of the principal case above, (Trotter vs. Trotter) is supported in the case of Van Dyke's Appeal, 60 Pa. St., 481, concerning a Pennsylvania will where the court says in part, p. 490:

> "The case before us is of a will duly executed according to the laws of Pennsylvania, devising lands in New Jersey, where however, it is invalid as to the reality by not having two subscribing witnesses. A court of New Jereys might hold themselves on these authorities bound to shut their eyes on the devise of the reality, and consider it as though it were not written, and so they have held. (Kearney vs. Macomb, 1 C. E. Green, 189.") * *
>
> "But a statute of New Jersey has no such moral power over the conscience of a court of Pennsylvania to prevent it from reading the whole will upon the construction of a bequest of personalty within its rightful jurisdiction. If a question could arise directly upon the title of the heirs at law to the New Jersey land, doubtless the court of any other State, upon the well settled principles of the comity of nations, must decide it according to the lex rei sitae. We are dealing only with the bequests

of personalty, and the simple question is whether the testator intended to annex to them a condition."

And the true application of the principal case from the other side (the side of the situs) is also shown in the case of Jones vs. Jones, 8 Gill, (Md.,) 197, concerning the effect, (as to the same doctrine of election) of a Pennsylvania will of Maryland real estate, invalid as to the real estate through defective execution. The court says in part, p. 207:

> "Whatever may be its construction and effect in Pennsylvania, it cannot operate to divest either party of his inheritance here, or put him to his election. There is no such expressed condition in this will, and we cannot as before said, imply it."

5. **Enolim vs. Wylie,** 10 H. L., Cases 1, (1862), was simply a question whether a Russian will was intended to include English personalty. We do not understand that the case attempts to decide any rule of interpretation except concerning the disposition of personal property.

6. **Chamberlin vs. Napier,** L. R., 15 Ch. Div., 614, (1880) seems to support the general rule, and in no way the appellant's claim. It was a question of marriage settlement, the realty being in England and the rest of the property in Scotland, and the marriage domicile there also. The Court interpreted the settlement as to the land by the English law, and otherwise by the Scottish law, and said in part, (p. 630) approving the rule adopted in Lloyd vs. Guibert above):

> "Mr. Justice Willes in the judgment delivered by him in Lloyd vs. Guibert, after referring to the general rule that the law of the place where the parties contracted was prima facie that which they intended to adopt, says, 'that such law ought, therefore, to prevail in the absence of circumstances indicating a different intention, as for instance, that the contract is to be entirely performed elsewhere, or that the subject matter is immovable property situated in another country, and so forth.'" * *

And the Court concluded, p. 633.

> "It is in my opinion, as plain as possible that the contracting parties did in substance, though not in direct terms, say that the trusts, so far as the husband's property is concerned, should be considered as being in a settlement to be construed by the law of England. That is quite consistent with the general rule laid down in the judgment delivered by Mr. Justice Willes in Lloyd vs. Guibert, and no authority has been referred to which is contrary to that rule."

7. **Boyes vs. Bedale,** 1 Hem. & M. 798 was over-ruled in the subsequent case of ReGoodman's Trusts, L. R. 17 Ch. Div. 266, 299.

8. **Danelli vs. Danelli,** 4 Bush., 51. The testator was domiciled in Kentucky and the land was in the same State. The question was raised as to whom the testator meant by "children or heirs" and whether a claimant was the legitimate "child" of a brother. The court concluded that the validity of the marriage depended on the law of the place of marriage but the intent of the words "children or heirs" on the law of the place where the will was made and the testator domiciled. The domicile and the real estate and the forum were all in Kentucky, and we do not see how the decision or any dicta in it can illuminate the path to a decision here. We do not believe the case was intended to modify the earlier Kentucky decision that:

> "It is an acknowledged principle of law that the title and disposition of real property is exclusively subject to the laws of the country where it is situated."
>
> Cornelison vs. Browning, 10 B. Mon., 425,

9. **Bible Society vs. Pendleton,** 7 W. Vir., 79, the testatrix had previously conveyed all of her real estate in Pennsylvania by deed, *inter vivos*, to a party in trust, to sue for and recover the same and sell it and then to hold the net proceeds "subject to such dispositions as the said Maria Cooper, by deed or other instrument of writing may hereafter direct." The will

was therefore a disposition of those proceeds after conversion accomplished by the prior deed, and as a will of personalty alone was properly governed by the laws of the domicile. (W. Virginia).

The Pennsylvania real estate was not concerned, as the prior deed was apparently accepted as valid in Pennsylvania as well as in West Virginia.

10. **Harrison vs. Nixon,** 9 Peters, 483, was similarly a question of personal property alone and its dicta were not intended to affect realty.

From before the early leading case of McCormick vs. Sullivant, 10 Wheaton, 192 (1825), so generally cited, to the latest case of DeVaughn vs. Hutchinson, 165 U. S. 566, 570, (1896) this Court has, as already stated, always consistently held as to real estate: (quoting from last case).

> "It is a principle firmly established, that to the law of the state in which the land is situated, we must look for the rules which govern its descent alienation and transfer, and for the *effect* and *construction* of wills and other conveyances."

11. **Crusoe vs. Butler,** 36 Miss., 150, (1858), was a question as to whether the one executor of an Alabama will, who alone qualified, had power to sell Mississippi land under the following power of sale in the will: "I do hereby declare and direct and give full power and authority to my said executors (two previously named) or the survivor of them" to sell, etc.

The Alabama Court had previously decided (Leavens vs. Butler, 8 Porter, 380), with reference to this same power and will, some twenty years before: p. 390.

> "The testator has not made the plaintiff in error, who seems to be the only acting executor, a mere naked trustee, but he has made him a beneficiary of his bounty to the extent of one-fourth of his estate, and has thus coupled his trust with an interest."

The Mississippi Court followed this Alabama decision, by way of comity, and held that the one executor could therefore act alone in conveying the Mississippi land.

12. **Wilson vs. Cox,** 49 Miss., 538, adds nothing to the force of the earlier case. The case was a question of election by the widow of a Louisiana testator as to the Mississippi lands, and the Court held that the widow must make her election at the domicile for the whole estate.

The Court said in part: p. 545.

> "Her election, if made at all, must be in the forum of the original probate, whose law fixes her rights as distributee in all the jurisdictions where property may be situated. The 110th article of the code, p. 452, reverses the common law rule of distribution in cases of intestacy, substituting the law of the rei situs for that of the domicile."

But the above could not have been intended to mean all that it expressed. No Court could literally fix "her right as distributee" in foreign lands where the "law of the rei situs" governed the distribution. The case may go far enough to give the Court of the domicile the right to determine as to the widow's election—as a question in personam rather than the determination of a right in rem—but the carelessness of its expression, as above illustrated, cannot give force to all the possible meanings of its language beyond its application to the facts concerned.

Whatever the dicta of the two cases above cited may be supposed to mean, the fact is that no State goes to greater lengths than Mississppi in controlling the transfer of property, both real and personal, within its limits. Under section 1950, code 1871, even personal property has been distributed under its laws, without regard to the law of the domicile of its owner.

> "The necessary effect of the statute is to abolish ancilliary administration here altogether. * * * Whatever surplus remains after creditors have been satisfied must be distributed to the next of kin, as prescribed by

our laws, although different persons from those who take in the jurisdiction of the domicile."

Partee vs. Kortrecht, 54 Miss. 67, 70, (1876).

"Her power of disposition and dealing with it (Mississippi land) are by our laws impressed upon the property itself. As to none of these things has the law of Louisiana (the domicile) the slightest influence." * * * "The principle of comity does not require a State to regard the laws of any other State so far as they may affect contracts in relation to real estate situated in the former State."

Frierson vs. Williams, 57 Miss. 451, 463, 464, (1879).

Would Mississippi under these decisions give effect to an intention solely *imputed* by South Carolina law?

13. **Wilkins vs. Allen,** 18 How., 385. A case where the testator was domiciled in Pennsylvania, and the land concerned was situated in the same State. That case cannot help the appellant here, and the law of Pennsylvania would deny his claim; see Page's estate, 75 Pa. St., 87, on page 29 of this brief.

14. **Wood vs. Wood** 5 Paige ch. 596 was practically overruled in the subsequent case of Chamberlain vs. Chamberlain 43 N. Y. 424, 431, also cited by the appellant, and the dicta of the latter case were evidently intended concerning the disposition of personalty.

P. 435. "The case of Wood vs. Wood (5 Paige 596) was peculiar in its circumstances, and can, in view of the final disposition of it by the chancellor scarcely be regarded as a precedent."

P. 433. "*Personal* property has no locality, and therefore the law of the domicile of the owner governs its transmission, either by last will and testament or by succession in case of intestacy."

15. **Cross vs. U. S. Trust Co.,** 131 N. Y., 330.
Dammert vs. Osborn, 140 N. Y., 30.

Were both cases concerning personalty alone, and raised questions as to whether the New York statute against perpetuities would prevent the operation of the general rule, that the law of the domicile governs as to personalty. The statute was held to be restricted by its terms "to domestic wills that by their terms are to be executed here."

16. **Caulfield vs. Sullivan,** 85 N. Y., 153, was a case where a New York testator living temporarily in France gave all his property to A, on condition that she would give so much of it as was in America to B. A took all the property in France under the will, and then tried to collect a large claim against the testator from the New York estate. The New York Court compelled A. to elect whether she would abide by the will or prosecute her claim.

The question in the case at bar is not as to an election by a beneficiary, but as to a conversion of land under the will.

17. **Parsons vs. Lyman,** 20 N. Y., 103, involved a question of the administration of the proceeds of two houses held by leasehold (which were treated as personalty). There was a disagreement as to the construction of the will between the Surrogate of New York, (the locus), and the Supreme Court of Connecticut, (the domicile). The Court of Errors of New York held that it was a matter not of jurisdiction, but of judicial discretion depending on the particular circumstances of the case; and that here the Surrogate should permit the executor to transfer the net assets to the Connecticut jurisdiction, "whose duty it thus becomes to decide all questions regarding the distribution of the moneys of the estate."

The plaintiff in error gains no support from the above case; especially not when explained by the later case of Despard vs. Churchill 53 N. Y. 192. *Syllabus:* "A leasehold estate for years, of lands situate in this state owned by a resident of another state, will be considered as personal property, and as such, as to its transmission by last will and testament, controlled by the law which governs the person of its owner."

And the Court on page 199 practically cites the above case of Parsons vs. Lyman as its authority for that conclusion.

The New York cases cited heretofore on page 29 are more nearly in point concerning the New York rules as to the local control of New York lands, than either of the Appellant's New York cases above.

18. **Guerard vs. Guerard,** 73 Ga., 506, held that the words "own right heirs" were to have the meaning given them at the domicile. They were treated as a *descriptio personarum.*

As to "construing" the will, however, the Court said (p. 510):

> "Wills devising real estate situated in this State will be construed according to the rules of construction adopted by the laws of this State.

We add a reference to another Georgia case which is more in point as to the effect of foreign decisions upon Georgia lands.

Kerr vs. White, 52 Ga., 362, concerning a Tennessee will leaving Georgia lands to Mr. White, also of Tennessee, in trust. The Court said in part: p. 270.

> "If Mr. Kerr might own real estate here he might convey or devise it to Mr. White in fee or in trust, provided he did it according to the laws of this State. That the deed or will has a trust attached does not alter the matter?
>
> "We do not think it necessary to go into the meaning of the law of Tennessee. That, in our judgment, has nothing to do with it. This is Georgia land, and the title to it is to be regulated by our law, and not the law of Tennessee. Mr. White has the title under our law, and any conditions imposed by the Courts of Tennessee cannot affect it."

We cannot believe that the appellant's claim would prevail in Georgia.

19. **Van Steenwyck vs. Washburn,** 59 Wis., 483.
Washburn vs. Van Steenwyck, 32 Minn., 336.

Two cases concerning the same estate. The testator was domiciled in Wisconsin and owned real estate in both states. The question was whether the widow, then incurably insane, must elect whether she would take under the will or would take her statutory rights; and how such an election could be made in her case.

The Wisconsin court held that the widow must elect; that it could elect for her, and that she thus elected to take under the will. And that Court said in part, p. 510:

> "How this election may or should affect the rights of the widow in real property in other States is a point upon which we decline to express an opinion, although the executors ask us to decide the question here. But it seems to us the decision of that question may properly be left to the tribunals of the State where such real estate is situated." * * * *
>
> "This observation however may be made; it is generally agreed by writers on the subject, and the rule has frequently been acted on by the Courts, that the interpretation and construction of the will belongs to the tribunal of the domicile of the testator." * * * *
>
> "But real estate is governed by the lex loci and questions in respect to it properly belong to the jurisdiction where it is situated. There may be exceptions to this rule, as the Counsel for the executors claim. But suffice it to say, we shall not attempt to define the rights of Mrs. Washburn in real estate in other states. * * *
>
> "But the construction of this statute (Minnesota), as well as the question as to what effect must be given the election for the widow made by the Probate Court (Minnesota) we shall leave for the decision of the Supreme Court of Minnesota."

The position of the Wisconsin Court as to its power of interpretation and construction is still further explained in the later cases of Ford vs. Ford, 70 Wis., 19; 72 Wis., 621, and Frame vs. Thormann 102 Wis., 653, hereinbefore referred to

The Minnesota Court said in part, p. 347:

> "Although the testator at the time of his death had his domicile in the State of Wisconsin where the will

> is executed and where the widow still is domiciled, we refer to the law of our own State for the descent of lands situated here. It is an established principle of the law, that real estate is exclusively subject to the laws of the government within whose territory it is situated. This governmental power of the State is a necessary incident of the sovereignty which every nation exercises within its own borders." * * * *
>
> "P. 357: Of course the principle of the State sovereignty, to which we have already referred, forbids that the tribunals of one State should assume to affect directly by their judgments the title to lands within another State." * * * * *

The Minnesota Court held that as the decree of the Probate Court had been appealed from, the probate proceedings in Minnesota were still in abeyance when the Wisconsin decision was made; that the Wisconsin Court had jurisdiction to determine whether the widow should *elect*, and that the election having been thus first made there for *a part*, it would be held to have been made for the *whole estate*. That the parties and the matter being the same, and within the jurisdiction of the Court, it was res judicata. The question was treated in both Courts as one *in personam* as to the widow's status under the will, and not as one *in rem* concerning the disposition of Minnesota lands.

In the earlier case of State vs. Ueland, (Judge of Probate) 30 Minne., 277, (1883), concerning the same will and estate, the executors endeavored to restrain the Minnesota Probate Court from construing the will and determining an election for the widow. One of the facts involved as stated in the record, being the pendency of a case in the Wisconsin Circuit Court brought by the executors to determine the same matter. The Minnesota court did not directly discuss the conflict of laws, but held generally that the Minnesota Probate Court had jurisdiction; and said in part: p. 282

> "Hence in the proceedings now pending in the Probate Court, that Court has the power to construe the will of the decedent, in order to determine whether, under

its provisions, it is a case for an election on the part of the widow."

The scope and reason of the Minnesota decision above, appears more clearly in the similar later case of Lee vs. Tower, 124 N. Y., 370, (1891), where the question was whether a Pennsylvania widow was bound, as to New York real estate, by her election in Pennsylvania. The New York Court said in part: p. 374.

> "When the widow accepted the provision made for her, she in legal effect consented to all the terms and conditions annexed to it, and yielded every right inconsistent therewith.
>
> "No one can be allowed to disappoint a will under which a benefit is accepted, but on the contrary must concede full effect to the dispositions thereof."

But that very case treats of *conversion* as a very different kind of question, and claims the unrestricted right to determine it for land situated in New York; and so does the Minnesota Court also concerning that same will and estate In Re Towers estate, 49 Minne., 371, (1892). There is a marked difference between a question of election, and the question as to whether or not certain lands have been converted into money under a will.

The Ohio Court in the case of Jennings vs. Jennings, 21 Ohio, St., 56, already cited, compelled a widow to elect as to the Ohio land, holding that it was the intention of the testator, as interpreted by the Ohio law, that her legacy should be in lieu of dower, and not in addition to dower, as it was conceded was the intention as interpreted by the laws of West Virginia, the domicile.

In the case of Appperson vs. Bolton, 29 Ark. 418, (1874), a Tennessee widow had renounced her provision in the will in a Tennessee Court and the Court had apparently said that that action under the laws of Tennessee must govern also as to her interests in the Arkansas lands.

The Arkansas Court said in part: p. 426.

> "The alienation, transmission and descent of real estate is governed by the laws of the country or State in which it is situated.
>
> "This rule is general, and there is no diversity of opinion about it. So the general rule is that the right of dower in real estate is governed by the locus rei sitae." * * *
>
> (p. 429). "But it has been suggested that if a dissent in Tennessee is not a valid dissent in Arkansas, an acceptance of the provisions of a will in Tennessee would not be binding here; and that if Bolton had devised to his wife his whole estate in Tennessee, no matter how large, she might have accepted it, and then dissented in Arkansas and claimed dower in the estate here. But we think, though the point is not before us, that she would not be permitted to do that, for it is a general principle of law that one cannot claim under a will and against it too, and an acceptance of the provisions of the will in Tennessee would bind her everywhere."

The court held that the provision of the will was intended in lieu of dower and that the widow was barred of her dower in the Arkansas lands because she had not dissented as required by Arkansas laws.

The rule concerning the doctrine of election, as applied in the English case of Trotter vs. Trotter, (from the dicta in which the claim made by the Appellant seems to have started) and in the later Wisconsin case of Van Steenwyck vs. Washburn, although regarded differently by other Courts, does not apply to the doctrine of equitable conversion. There is not the same reason for it. Election is a question of requiring equitable action by a person claiming under the will in one place and against it in another. It is a question *in personam;* of personal honesty and right action. Conversion is a question of how the will disposes of the lands; a question *in rem.* Not, *who* is to take? Or, *how much he ought to take.* But, how the will affects *the land* in question.

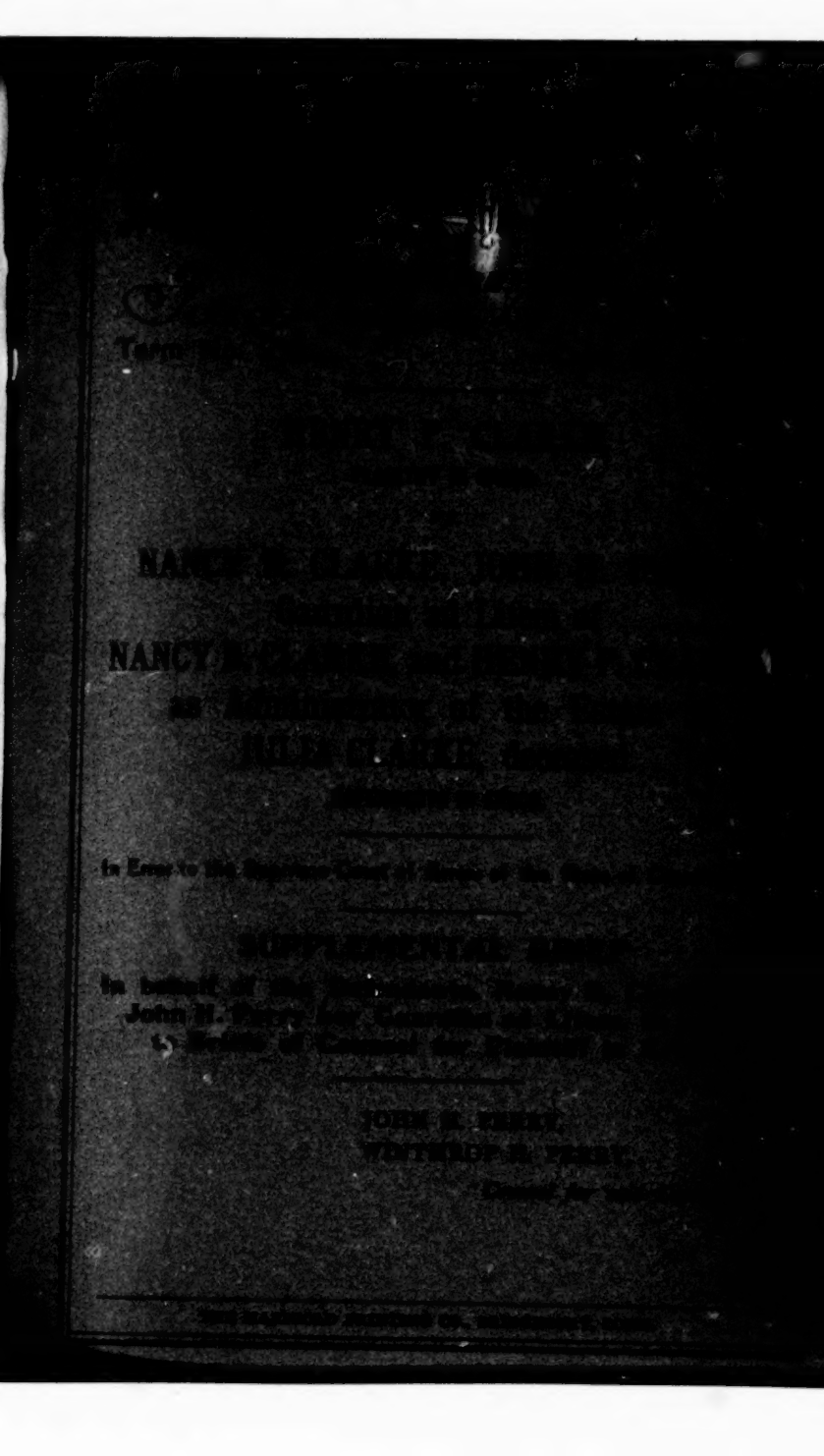
And there is a similar difference in the application of the rule of *res judicata* to questions *in personam* and to those *in rem*.

Watkins vs. Holman, 16 Peters, 25, 57.
Burnley vs. Stevenson, 24 Ohio. St. 474.

All of which is respectfully submitted.

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Of Counsel.



Supreme Court of the United States.

October Term, 1898.

HENRY P. CLARKE,
Plaintiff in Error,

vs.

NANCY B. CLARKE ET AL.
Defendants in Error.

No. 216.

SUPPLEMENTAL BRIEF FOR NANCY B. CLARKE AND JOHN H. PERRY, HER GUARDIAN AD LITEM, IN REPLY TO BRIEFS FOR PLAINTIFF IN ERROR.

PART I.

BY WAY OF CRITICISM.

A.

At the end of the first brief filed by counsel for plaintiff in error on March 14th, beginning with page 27, what is described as "the full record of the South Carolina Case" is printed. We do not know what use Counsel may expect to make of this, or what bearing it may be supposed to have upon the pending question.

We claim, however, that it should not be read, or referred to for any purpose, and ought not to be in the brief. It con-

stituted no part of the Connecticut case, and now appears for the first time since we became connected with the litigation.

In the Connecticut Court of Probate, merely "the *decision* of the *Supreme Court* of South Carolina," (record p. 8, folio 20) was filed, and in the finding of the Superior Court only "the report of the case in 46 So. Car. 230" was referred to.

This excludes all of the record printed in their brief before the word DECREE on p. 34, as well as the last two clauses on p. 38, and the clause at top of p. 39.

B.

The same brief in the third paragraph on page 2, states that the father in his individual capacity was "duly represented" in the probate court. The probate record (last two lines p. 7, and first two lines p. 8 of transcript) shows that he did not appear there as an individual although he undoubtedly might have done so.

C.

Of their assignment of errors, wherever it appears in the case, (as for instance at top p. 4. of the brief in question), it should be said that the only claim made in the Court below is found in folio 74, p. 43 of transcript, and, as made, it counts upon no part of the South Carolina judgment except the single clause that "the will worked an equitable conversion into personalty at the time of her death of all the real estate of the testatrix wherever situated." Their assignment of errors accordingly covers materially more ground than the claim by which it should be limited.

D.

Counsel for plaintiff in error are apparently permeated with the belief that Mr. Clarke was really a party to the South Carolina suit as an individual, and really appeared therein in that capacity, (see p. 7, of their first brief). The report of the case utterly fails to bear out this theory, and certainly shows that Julia's estate was entirely unrepresented either by trustee or administrator therein.

E.

In the last paragraph on p. 10 of the above brief, it is claimed that Mr. Clarke "as an individual" "set up the judgment and proceedings in the South Carolina Courts * * * as record evidence and conclusive of his own rights as an individual and those of his daughter." We earnestly protest against this statement.

A reference to the record, (p. 8, folio 20) already several times referred to, will show that he did not appear as an individual at all, and that he did not set up the judgment here relied on.

As administrator of Julia's estate, he caused to be filed in Court *merely* "the decision of the Supreme Court" affirming the judgment here relied on.

That decision could not become a bar or work an estoppel.

If anything in any event could avail the plaintiff in error, it surely would be the judgment of the Circuit Court, (never introduced in the Probate Court), and not the decision of the Supreme Court affirming it. The decision filed was evidently intended to be only a reason for a similar decision by the Probate Court.

F.

In the second brief filed by the plaintiff's counsel on Mar. 22d, a statement in the last paragraph on p. 2, (somewhat obscured by an evident misprint), if important, needs correction. The personal and real estate of the testatrix already severed from all connection with that of others, amounted at her death to $158,825, (record, p. 14, par. 10,) while her debts and legacies amounted to not more than $65,000.

The situation was of course very different when the will was made two years and a half before. At that time her grandfather, from whom her property was derived, had but just died, (p. 14, par. 10) and, coming to the place of his late residence and the city where the great bulk of his property, and her inheritance, was situated, she made her own will under the guidance of local counsel. She evidently made it on

account of the sudden and vast change in her financial condition, for there is nothing to show that she owned any property before. Is it probable that a person who came to Connecticut to dispose of a Connecticut fortune by the help of Connecticut Counsel, desired to have the expressions which she used in so doing bear a sui generis South Carolina construction which she could not possibly have foreseen?

PART II.

THE SITUATION AS WE VIEW IT.

The real situation does not seem to us to be as portrayed by the plaintiff, but to be as follows:

Mr. Clark, as executor of his wife's will and trustee for Nancy (but not for Julia), had obtained the South Carolina decision.

Under that he attempts no action of any kind in Connecticut. A year afterwards he takes out administration there upon Julia's estate.

In that capacity the South Carolina decision had no binding force upon him whatever. He subsequently inventoried her assets as consisting of an undivided interest in "real estate." He manifestly believed that the South Carolina decision, proprio vigore, accomplished nothing, and that the Connecticut Courts were now in control. He was quite correct in this belief, for otherwise, all he had to do was to sell his wife's property as executor under that decision, and transmit the proceeds to his home for distribution there. Accordingly he does not ask to have the South Carolina judgment enforced; he does not pretend that he can carry it out; he does not ask for authority to convert his wife's real estate and pay over the proceeds as money to Julia's estate; but having passed the property along as "real estate," he in his capacity as administrator represents that Julia "died intestate and *possessed of real estate* in this District," and asks the Court of Probate to ascertain to whom "this estate shall be *set out and distributed.*" (p. 6, folio 9). The Court of Probate, at the request of this official

not connected with the South Carolina decision, settling an estate not affected by it, awards the "real estate" upon which he requested it to act to the only person who could possibly inherit under the law alone administered in that tribunal.

If the administrator should tender money to Nancy as her inheritance from Julia's estate, Nancy might well reply, my mother owned land at her death, one-third of which she gave to my sister, which third it was your duty to secure and administer and afterwards pass on to me.

As between you, Mr. Administrator, and my sister's estate and me, the South Carolina Courts have not worked any miracles which make my land money and then diminish it one half.

If the plaintiff's contention be sound, Connecticut residents will often be compelled to ask the Courts of other states to determine their title to Connecticut lands, because derived from the deeds or wills of non-residents which cannot be authoritative construed except by the Courts of the domicile, and several consecutive wills disposing of the same piece of land in ipsissimis verbis, might convey as many different titles as the testators had domiciles.

PART III.

CONCERNING THE CLAIMS MADE AND THE AUTHORITIES CITED FOR THE PLAINTIFF IN ERROR IN THEIR TWO BRIEFS.

The Counsel for Plaintiff in error seem to make and rely upon five principal claims: three shown in their brief filed March 14th, and two in their brief filed March 22nd, all of which their course of reasoning tacitly admits must be sustained to make good their contention. These are in their order:—

I. That the parties, though not nominally the same, were "really and subitantially the same" in the pro-

ceedings in both states; that "In the South Carolina case, every possible interest was represented."

(See pages 5 and 7 of their first brief).

II. That "the subject matter"—"the sole question considered," in both of the proceedings, was, "whether or not there was an equitable conversion of Mrs. Clarke's real estate by her will at the time of her death into personalty." That is, a question of the construction of the will, as to whether or not there was an equitable conversion, irrespective of the lands affected thereby.

(See pages 11–13 of their first brief).

III. That this question, whether or not there was an equitable conversion, was a question *in personam* and not a question *in rem*.

(See pages 16–17 of their first brief).

IV. That the South Carolina Court had such jurisdiction of the parties in this case, that it was immaterial whether or not the real estate concerned was within its jurisdiction; and besides, that the power of the South Carolina Court to enforce its judgment in Connecticut was not a test of the validity of that judgment there.

(See pages 14–15 of their first brief and first eleven pages of their second brief).

V. That it is for the Court of the domicile to determine the interpretation, construction and effect of a will of foreign real estate.

(See last twelve pages of their second brief).

We have already considered the above claims in our principal brief, but would add a few words, especially in reference to the cases not hitherto referred to, which are now cited for the plaintiff in error in their support.

I.

It is virtually conceded that the parties were not nominally the same in the two proceedings, but the plaintiff in error claims that they were "really and substantially the same." Not that they were the same in identity and legal character, but the same in the interests they actually appeared for, and that all the interests concerned were in Court in both cases. That, as a conclusion of equity rather than of law, the parties should be held to be the same. In addition to the claims of our principal brief, we add in direct answer; that while Nancy was a party defendant in South Carolina, she was but seven years old and could not in law or in fact submit or represent her Connecticut interests there; nor could her guardian ad litem appointed by the South Carolina Court submit her Connecticut interests to the jurisdiction of that Court, or properly represent those interests there by virtue of his South Carolina appointment.

However good the reason may be for interpreting a will by the law of the domicile, or of the last domicile, whether because the testator has used a phraseology peculiar to that locality, or because, in the case of a will of personalty, the law of the last domicile governs the succession, cannot apply in this case.

The South Carolina Court has no power to act for, or control, any Connecticut land, unless by personal coercion of an owner having full power and capacity to act. Surely the South Carolina Court could not give a guardian ad litem the power to represent an infant it could not coerce and an interest it could not control, and *thus* obtain for itself a jurisdiction of that interest. Nor could Nancy or the South Carolina Court delegate any power to act for or bind her Connecticut land where neither could do anything to directly affect that land. How therefore can the plaintiff in error claim that Nancy's Connecticut interests were properly represented before the South Carolina Court, or that that Court took a proper jurisdiction of Nancy's interests in the Connecticut land?

The South Carolina Court did not try to determine any personal rights or personal relations, but the effect of the will

upon the lands of the estate, including the Connecticut land. The effect of the will upon the Connecticut land,—the status of that land and consequently the status of Nancy's interests in that land,—is claimed to have been determined by the South Carolina judgment, although Nancy's Connecticut interests were not and could not be properly represented before that Court, as is plainly shown by the fact that the South Carolina Court could not in any way act upon those interests or enforce any decree concerning them, either directly or by any coercion or act of Nancy herself.

How can the plaintiff in error claim that "In the South Carolina case every possible interest was represented?"

It is also obvious, that in such a question concerning the status of land, the guardian ad litem in the South Carolina Court and the guardian ad litem in the Connecticut Court, represented different interests, under different appointments, with different powers and responsibilities. That their interests were as different as their persons.

Neither as a matter of equity, should Nancy be bound in reference to the Connecticut lands simply because she was made a party to the South Carolina case. She had no full opportunity to protect her Connecticut interests. She could not act for herself or bring her rights to trial first in Connecticut. She could not make or urge any claim anywhere. The plaintiff in error acted in his own way, at his own time, before his own tribunal, where Nancy was represented only by a representative with a limited local authority, and with no title in or power to represent any property or right beyond the actual jurisdiction of that Court. It is not equitable for this plaintiff in error to claim that his infant daughter was equitably estopped by that determination, under the inherent limitations of such a situation, from referring her interests in the Connecticut lands, by a representation at the situs, to the Court there in control.

The Counsel for the plaintiff in error cite a number of cases in the first ten pages of their first brief as supporting their claim that the parties in the two proceedings were "sub-

stantially the same" and that "In the South Carolina case every possible interest was represented," but they in no way meet our above claim that Nancy, being an infant, could not submit any issue concerning her interests in Connecticut land to the South Carolina Court, either by her own act or appearance, or by any authority or act of a South Carolina guardian ad litem; or our claim that her Connecticut interests could not in any way be brought or represented within the jurisdiction or power of the South Carolina Court to affect them directly in rem or indirectly through any person whomsoever acting under its judgment or power.

Neither do they meet the objection that the daughter Julia's estate was not represented before the South Carolina Court. Even if there were no debts chargable against her estate and the father and infant sister were the final beneficiaries thereof, there was more than a mere distribution involved. There was the very question, whether these two were the immediate distributees, as heirs-at-law of real estate, or whether the estate was wholly personalty and in the nature of a chose in action, an unliquidated share of the mother's personalty or a claim against the executor of her will, where an administrator would seem to be a necessary party. Should not that interest have been represented in South Carolina? Should an administrator in Connecticut be bound by that incomplete collateral representation before the South Carolina Court?

The plaintiff in error claims that because Nancy and her father were the only heirs-at-law and next of kin of her sister, there was no necessity of any further representation of the sisters estate before the South Carolina Court; doubtless upon the claim that all the interests concerned were equitably represented. We claim again, that irrespective of the other interests, neither Nancy, nor her South Carolina guardian ad litem, had any power equitably or otherwise to represent there her interests in her sister Julia's estate which were in question in the Connecticut case.

Certainly the cases cited by the plaintiff in error do not support any claim that Henry P. Clarke's appearance as Exec-

utor and Trustee before the South Carolina Court, bound him as the administrator of Julia's estate under the subsequent appointment in Connecticut.

Neither do they pretend to support any claim that the appearance of Henry P. Clarke as Trustee for Nancy under the mother's will could in any way represent the interests of Nancy as a distributee of her sister's estate. Even if the Trustee could represent the cestui que trust, Nancy's interest from Julia was not under any trust, but absolute in her.

Their cases seem to be cited to the effect that the plaintiff in error, though acting only as executor and only at the expense of his wife's estate, was personally bound by the South Carolina judgment, which as is shown above, by no means meets our claim that the parties and interests were not the same; and is besides answered in that and other respects by the citations of our principal brief.

The complaint to, and decree of the South Carolina Court properly related to the construction of the will and the powers and functions of the executor, only in so far as he had been qualified by the South Carolina Probate Court to administer the estate within that jurisdiction. But the plaintiff in error claims here, that that decree bound him individually, as well as in his capacity as executor, because he was that executor, and bound him individually not only as to those interests within the scope of the issues of the action, but also as to his individual interests which were entirely without and beyond every issue which the plaintiff executor could raise;—not only as to any defense, o further support to the plaintiff executor, he might have made or given in his individual interest, but also as to any interest he might individually claim in Connecticut lands, though entirely outside of every issue properly raised under the complaint, or properly within his powers or functions as executor under his South Carolina qualification.

The following appear to be the more important cases cited by counsel for the plaintiff in error in support of their above claim that the parties were the same; or rather to the one point

that the plaintiff in error was bound individually by the South Carolina judgment in his favor as executor.

1. **Maingault vs. Deas, Baileys Eq., 283.** (1st brief, p. 5).

   In this case the pleadings of the defendant bank made Mrs. Deas a party to the first suit as "Executrix" also, hence she was bound upon *the face of the record* in that capacity as well.

2. **Small vs. Small, 16 So. Car., 64.** (Pl. 1st brief, p. 6).

   In this case both judgment and execution ran against the defendants de boniis propriis, hence their individual property was necessarily liable.

3. **Verner vs. Bookman, 53 So. Car., 398.** (1st brief, p. 6).

   The judgment only affected the administrator individually after he neglected to obey it officially and so became guilty of a devastavit.

On page 7 of their first brief it is claimed for the plaintiff in error that a judgment against an executor binds him individually as a devisee or distributee. See, *contra*, Bank vs. Good, 21 W. Va., 455, 461.

4. **Markley vs. Singletary, 11 Rich Eq., 393.** (1st brief, p. 7).

   Holds that where infant has been dead 20 years the presence of an administrator is desirable but not indispensible. In the case at bar they found it indispensible.

5. **Morton vs. Packwood, 3 La. Ann., 173.** (1st brief, p. 8).

   The remarks quoted must be purely obiter, for it is stated, p. 174, that any doubt as to whether the executor was not also in his individual capacity a party to the suit, is removed by the fact that he took the appeal on which the judgment was rendered *in his individual capacity*.

6. **Denegre vs. Denegre, 33 La. Ann., 689.** (1st brief, p. 8).

   It would seem that the widow by answering in the manner stated had made herself a party individually.

7. **Fouche Assignee vs. Harrison, 78 Ga., 410.** (1st br., p. 9).

The remarks quoted are eloquent and emphatic but far aside from the real point of the case.

The case only decides that an executor who has enjoined certain of his creditors from taking his legacy while asking the Court to say whether they or the creditors of the testator are entitled to it, cannot, pendente lite, assign it to others. This opinion furnishes a good example of expressions in the interpretation of which local light is desirable, for the judge delivering the above decision adds "the Court will not hold while he skins."

8. **Donifelser vs. Heyl, 52 Par. Rep., 468.**
Colton vs. Onderdonk, 69 Cal., 155.
Stewart vs. Montgomery, 23 Pa. St., 410.
(Small vs. Flint, 10 Mass., 128, not found as cited).
Kerrison vs. Stewart, 93 U. S., 155.
Corcoran vs. Canal Co., 94 U. S., 741.

Five cases cited for plaintiff in error on page 10 of their first brief. They do not seem applicable to the case at Bar. The first three concerned executors who were sole devisees, in the matter of claims against the estate and their realty; where their every act was necessarily a representation of their own interests. The last two cases were concerning the validity of trusts, where the trustee properly and naturally represented the interests of the cestui-que-trust.

II.

The claim of the plaintiff in error that the sole *subject matter* and *res* of the South Carolina case, was whether or not an equitable conversion was effectively directed, irrespective of the lands concerned, is untenable, as shown in our principal brief. They cannot separate the construction of a disposition of lands in a will from the effect of that construction or disposition upon the lands concerned.

Or if they could in this case, then upon their own showing the South Carolina Court only held that Mrs. Clarke intended to have her lands converted into personalty, which could not estop the Connecticut Court from going on to say whether that intention was sufficiently expressed to accomplish its purpose under the rules of Connecticut law. The Connecticut law is, (Record folio 49); "No general residuary devise and bequest can be given such an effect as respects lands in Connecticut, unless from the whole scheme of the will or the particular language employed, a power of sale is clearly implied. Conversion is effected by sale. Equitable conversion is effected by a power to sell and a duty to sell. It is not enough to manifest an intent that lands shall pass as money, unless there is also, either in terms or by implication, a grant of the means of turning it into money."

The South Carolina Court either attempted to determine the question of whether or not there was an equitable conversion of the Connecticut lands, or its judgment did not go far enough to estop the Connecticut Court under the above claim of the plaintiff in error.

III.

The claim of the plaintiff in error that the question of whether or not the will effected an equitable conversions of the lands of the estate, is a question *in personam* and not one *in rem*, is equally untenable as to the res—the lands concerned.

There was no attempt to determine any personal right of any kind of any party in interest, or any relation of any one party to another, but solely whether the will worked an equitable conversion of that land.

Neither was there any determination directed to or towards or concerning any person or personal rights or relations, but solely that the lands of the estate were equitably converted by the will.

Where can the personal element come in? What else can it be than a determination of the status of land. It was not an equitable conversion of any person, or as between any personal

claims, or of any personal right, but an equitable conversion of land; simply and solely a change in the status of the land; and whatever the rights in the proceeds might be, as between the parties in interest, was left to follow from the terms of the will. There was no dispute about or determination of any question of personal right or succession under the will.

It was solely a question in rem as to status of the land concerned.

> "It is true that, in a strict sense, a proceeding in rem, is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein."
>
> Pennoyer vs. Neff, 95 U. S., 714, 734.

And besides, no matter how it be regarded, whether as a question in personam or one in rem, the South Carolina Court did not have before it or within its power, any person or thing through whom or upon which, it could enforce any judgment involving the Connecticut lands.

The authorities cited on pages 16 and 17 of his first brief seem to be relied upon by the plaintiff in error in support of his above claim.

These are chiefly:

1. **Stoff vs. McGinn, 178 Ill., 46.** (Pl. 1st brief, p. 16).

   In this case no ex-territorial question is involved. The land was in Illinois.

2. **Brown vs. Brown, 7 S. W. Rep., 648. 86 Tenn., 277.**

   This case is cited by plaintiffs counsel as holding that suits for the construction of a will are always proceedings *in personam*. Whether this may be sometimes true, we do not care to discuss. That it is always true, we emphatically deny.

The case itself was an action by and between parties in interest to determine *their* respective relations or rights to the decedents property under his will. It was a question of the relative rights of the parties concerned, and not like the case at Bar.

The Court, (p. 647) itself defines a proceeding *in rem* to be "an adjudication pronounced (as its name imports) upon the status of a particular subject matter, by a tribunal having competent authority for that purpose." Which is precisely what the South Carolina Court—a Court without the authority—tried to do in the case at Bar.

3. **Black on Judgments, Sec. 808.** (Pl. 1st brief, p. 17) cited for the plaintiff in error to the effect that a suit for the construction of a will is not in the nature of a proceeding in rem, cites as its only authority the above case of Brown vs. Brown.

Sec. 850 as cited on same page, concerns only a personal judgment against the parties previously rendered between the same parties.

Sec. 922 as cited on same page, cites as its only authority the case of Caruthers vs. Corbin, 38 Ga., 86, hereinafter considered under the next heading.

But that author also says Sec. 859, "The duty of the Courts of one State to follow those of another, upon questions arising from the construction of statutes of the latter, is a duty resting alone upon comity, and not one imposed by the federal constitution."

And in Sec. 636, "But a judgment admitting a will to probate in one state is not conclusive of its validity as a testament devising reality in another State, unless permitted by the laws of the latter State. For real estate is governed by the lex loci rei sitae, and all questions concerning it, including the validity of a will by which it is devised must be determined by that law."

In Sec. 792, this author includes among judgments in rem those included in the following definition by the Vermont Court:

"A judgment in rem is founded on a proceeding instituted, not against the person, as such, but against or upon the thing or subject matter itself whose state or condition is to be determined. It is a proceeding to de-

termine the state or condition of the thing itself, and the judgment is a solemn declaration upon the *status* of the thing, and it *ipso facto* renders it what it declares it to be."

4. **Freeman on Judgments, Sec. 608.** As cited for the plaintiff in error, cites the same case of Brown vs. Brown, supra, as its authority.

The same author says, Sec. 607: "A judgment or order distributing the estate of a decedent or ascertaining and naming his heirs * * is a judgment in rem." Sec. 609: "In decreeing the sale of the real estate of a lunatic or of a deceased person the Court may also act in rem."

5. **Freeman vs. Alderson, 119 U.S. 185.** (1st brief, p. 17).

This was an action to recover an undivided interest in certain lands, to obtain a partition of it and to have that interest set apart in severalty to the plaintiffs—p. 190 "a sort of mixed action to try the title of the plaintiffs to the undivided half of the property and to obtain a partition of that half. Such action, though dealing entirely with the realty, is not an action in rem in the strict sense of the term; it is an action against the parties named." p. 187, "Actions in rem strictly considered, are proceedings against property alone, treated as responsible for the claims asserted by the libellants or plaintiffs."

6. **1 Herman on Estoppel in Res Judicata 617.** (Pl. 1st brief, p. 17).

If the *whole section*, from which the quotation is taken for the plaintiff, be read, it sustains our contention.

IV.

How can the plaintiff in error claim the South Carolina Court had such jurisdiction of the parties that it was immaterial whether or not the real estate concerned was within its jurisdiction?

There is no evidence in the decree of that Court, of any order to any person holding title to those lands, to do anything;

or of any action by that Court, or intention on its part, towards compelling or even suggesting any transfer or act by any one, excepting the Executor, to effect a sale of the foreign real estate. There is no evidence anywhere that the South Carolina Court intended or had to confine its jurisdiction over the Connecticut or any other lands of the estate to its hold upon the distributees of the lands, but it in set terms directed the Executor himself to sell all the lands irrespective of every other interest or party. Does the plaintiff in error claim, that because the father and daughter who owned the Connecticut land were before it, the South Carolina Court could conclusively determine their rights in that land by any order or personal coercion towards them ? There was no way by which the South Carolina Court could compel Nancy to make any sale or transfer of her Connecticut realty. She could not do it herself and no one but a personal guardian acting under a Connecticut appointment and Connecticut law could do it, and he certainly would not be authorized to do it because of any order of the South Carolina Court, to transfer the proceeds to South Carolina.

The plaintiff in error appears to possess courage for the situation, and boldly claims that the power of the South Carolina Court to enforce its judgment was not a test of the validity of that judgment in Connecticut.

> We refer him, for answer, to Johnson vs. Mallory, 74 Cal., 430, 432; "Courts should not render judgments which cannot be enforced by any process known to the law."
>
> And to Dicey on Conflict of Laws, p. 215. "The rule is now well established * * * which as already explained, forbids a court to give judgments which it cannot render effective, or which it can render effective, only by interfering with the authority of a foreign sovereign or the jurisdiction of a foreign court."
>
> And to Aspden vs. Nixon. 4 How., 499, to the effect that the title cannot be separated from the property.
>
> And to the law of his own State--Riddle vs. Reese, 53 So. Car., 198, that a judgment rendered by a Court without jurisdiction is a nullity although the defendant appeared, answered and went to trial without objection.

The plaintiff in this connection seems to rely upon the following cases to support his above claim:

1. **Arglass vs. Muschamp, 1 Vernon, 75.** (Pl. 2 br. p. 6).
   Kiddare vs. Eustace, 1 Vernon, 419. (1 br. p. 14; 2 p. 6).
   Toller vs. Carteret, 2 Vernon, 494. (Pl. briefs, id.

All cases where the Court acted through the parties which were before it.

2. **Penn vs. Lord, Baltimore, 1 Ves. Sr. 444.** (Pl. 1st brief, p. 14; 2nd, p. 6.)

Also a case where the Court acted through the parties upon their own submission.

> The Court says, p. 454: "As to the Courts not enforcing the execution of their judgment; if they could not at all, I agree, it would be in vain to make a decree, and that the Court cannot enforce their own decree *in rem* in the present case.
>
> * * * * * * *
>
> In the case of Lord Anglesey, of land lying in Ireland, I decreed for distinguishing and settling the parts of the estate, though impossible to enforce that decree in rem; but the party being in England, I could inforce it by process of contempt in personam and sequestration, which is the proper jurisdiction of this Court. And indeed in the present case, if the parties want more to be done, they must resort to another jurisdicton.

3. **Massie vs. Watts, 6 Cranch, 160.** (Pl. 2nd brief, p. 6).

This case follows the case above of Penn vs. Lord Baltimore, 1 Ves. 444 and bases its jurisdiction upon its control of the parties. We do not need to distinguish such cases.

The plaintiff in error however should have added to his quotation; "The inquiry therefore will be whether this be an unmixed question of title, or a case of fraud, trust or contract." The Chief Justice takes pains to state, p. 169, that if it be "an unmixed question of title," (as it is in our case), the foreign Court cannot act.

4. **Mills vs. Duryea, 7 Cranch, 481.** (Pl. 2 br., p. 4–6).

We do not claim that nil debet is a good plea to an action founded on a lawful judgment of another state, or that a lawful judgment of the South Carolina Court need not be given such faith and credit in Connecticut as it receives in South Carolina, but we do claim, what the above case assumes, that the South Carolina judgment, to be entitled to such faith and credit, must have been a *lawful* judgment *within the jurisdiction of that Court*, and that that jurisdiction could be inquired into in Connecticut.

In the case of Rose vs. Himely, 4 Cranch, 241, 260, Chief Justice Marshall had already said:

"Upon principle, it would seem that the operation of every judgment must depend on the power of the Court to render that judgment; or in other words, on its jurisdiction over the subject matter which it has determined. In some cases, that jurisdiction unquestionably depends as well on the state of the thing as on the constitution of the Court." "Upon principle, then, it would seem that, to a certain extent, the capacity of the Court to act upon the thing condemned, arising from its being within, or without their jurisdiction, as well as the constitution of the Court, may be considered by that tribunal which is to decide upon the effect of the sentence."

5. **Hampton vs. Connell, 3 Wheaton, 234.** (Pl. brief, id).

This case follows Mills vs. Duryea above and presupposes a valid judgment.

6. **Morton vs. Naylor, 1 Hill (S. C)., 439.** (Pl. brief, id).

An earlier South Carolina case than the one at Bar. It very properly follows Mills vs. Duryea above upon a similar question. It fully supports our reference to the application of that case and adds p. 445.

"No evil is to be apprehended from such a decision. The question whether the Court had jurisdiction of the person of the defendant or of the subject matter of the suit, will remain open to investigation. If the Court pronouncing this judgment had no jurisdiction of the

subject matter, the judgment would be necessarily void; if it had no jurisdiction of the person of the defendant, it could only operate in rem, and could not create a debt, by judgment against the defendant, to be enforced in another state."

7. **Burnley vs. Stevenson, 24 Ohio St., 477.** (Pl. 1st brief, p. 14).

We also have cited this case in our principle brief as an authority in distinguishing the plaintiffs claim from the case at Bar.

We understand this case to hold: That while a Court can compel a specific performance of a contract in relation to lands situate in another State, after having obtained jurisdiction of the persons of those upon whom the obligation rests, it could not make its own decree operate as a conveyance of those lands, because a judgment or decree in rem cannot operate beyond the local jurisdiction, nor could it make such a transfer through any master, commissioner or agent under its appointment or authority, but it could compel the performance of its decree by coercion of the parties before it, who confessedly owned and could control the land and its title, acting upon them in personam. How does this support the jurisdiction of the South Carolina Court in the case at Bar? The latter Court did not attempt to coerce the parties or to act upon them in personam in any way. Nancy could not, if she would, and therefore could not be made to carry out any such decree as to the Connecticut lands; and the South Carolina Court could not convert this land by its decree, or for her, by its own act or through any appointee or agent.

Even if they were to retain Nancy under a personal South Carolina control until she became of age, a Connecticut guardian could nevertheless, meantime, make a different and lawful sale and conveyance of her interests there.

8. **Carruthers vs. Corbin, 38 Ga., 75, 86.** (Pl. 1st brief, p. 15).

This was a case concerning the distribution of *personal* property under a will as that distribution had been determined by the Court of the domicile.

The Court also says, p. 86: "We fully recognize the rule here contended for, that this state will not enforce the laws of another state, which contravened the policy of our laws; but this case does not fall within the rule * * *

We are not called upon to enforce any illegal provisions of the will."

In the above case it was merely a question of personal rights in personal property; in the case at Bar it was a question whether the Connecticut Court must by its necessary process actually enforce a testamentary disposition of Connecticut real estate against its own laws.

9. Owens vs. Ohio, Cen. R. Co. 20 Fed. Rep. 10. (Pl. 2d brief, p. 9).

This and other cases in the same connection are cited for the plantiff in error to support his apparent claim that jurisdiction of this will as to part of the estate carries jurisdiction over the whole estate wherever situated, and that the South Carolina Court having taken jurisdiction first, is the proper Court to construe and determine the effect. We do not question the fact that process was served, suit begun and judgment rendered, first, in South Carolina. In fact the defendant in error was too young to bring a suit anywhere, and was dependent upon the plaintiff to determine their respective rights, as and when he chose.

How can these facts help the plaintiff in error here in a determination of the status of Connecticut lands?

The principal case above also holds, (p. 15): "This is a trust estate, and must be administered as an entirety for the protection of all concerned."

The case at Bar cannot be twisted into any similitude. It is neither such a trust; nor must it be administered as a whole. Under the will one-third was to go to the father absolutely and one-third to each of the two children, the one-third share of each child to be held in trust until she became 25 years of age or married. But Julia died before the case came into the South Carolina Court, thus terminating the trust for her, ipso facto, before it began, as is conceded, and her third interest was then and is intestate property.

The sole question in Connecticut was whether this last intestate third, so far as it lay in Connecticut, had been converted into personalty under the mother's will. There was no trust attaching to it nor any trustee accountable for it. Even if the plaintiff's contention were right, the trustee directly concerned would be the administrator in Connecticut accountable to the Connecticut Court.

10. Dehon vs. Foster 4 Allen 545. (Pl. 2d brief p. 7).

p. 551 "It (the case) is simply a controversy as to the relative rights of citizens of our own state to personal property belonging to insolvent debtors who are also domiciled here."

The able counsel for the prevailing party in this case, Messrs. G. F. Hoar and H. Gray, Jr., very happily expressed the true bearing of all these similar cases cited by the plaintiff: p. 547 "The jurisdiction of a Court of Equity (*excepting where declaring rights in or affording protection to real estate*) is *in personam* and not *in rem*, and is not impaired by the fact that the property is beyond the jurisdiction, if the defendant is within it."

We are clearly within the above exception and have no occasion to distinguish this case.

11. Brown vs. Desmond, 100 Mass., 269. (Pl. 1st brief p. 15).
Lewis vs. Darling, 16 How., 16. (Pl. 2d brief, p. 9).
Cheever vs. Wilson, 9 Wall., 121. (Pl. 2d brief, p. 8).
Green s. Van Buskirk, 5 Wall., 307, 7 Wall., 199. (id).
Phelps vs. McDonald, 96 U. S., 298. (Pl. 2d brief, p. 7)
Hart vs. Sansom, 110 U. S., 154. (Pl. 2d brief, p. 8).
Cole vs. Cunningham, 133 U. S., 119. (Pl. 2d brief, p. 8)
Carpenter vs. Strange, 141 U. S., 87. (Pl. 2d brief, p. 8).

As cited for the plaintiff in error, merely establish the well understood doctrine, that a court of equity acting directly upon the parties before it, may enforce a decree in personam by personal coercion, though it indirectly affects property in another jurisdiction.

We have already cited and quoted some of these same cases to this effect in our principal brief, and we add these further quotations:

"Where the necessary parties are before a court of equity, it is immaterial that the res of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the lex loci rei sitae, which he could do voluntarily, to give full effect to the decree against him.

Without regard to the situation of the subject matter, such courts consider the equities between the parties, and enforce obedience to their decrees by process in personam."

Phelps vs. McDonald, 99 U. S. 298, 308.

"The real estate was situated in Tennessee and governed by the law of its situs, and while, by means of its power over the person of a party, a Court of Equity may in a proper case compel him to act in relation to property not within its jurisdiction, its decree does not operate directly upon the property, nor affect the title, but is made effectual through the coercion of the defendant, as for instance, by directing a deed to be executed or cancelled, by or on behalf of the party. The Court 'has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title,' Hart vs. Sansom 110 U. S. 151, 155."

"Hence although in cases of trust, of contract and of fraud, the jurisdiction of a Court of Chancery may be sustained over the person, notwithstanding lands not within the jurisdiction may be affected by the decree, (Massie vs. Watts, 6 Cranch 148) yet it does not follow that such a decree is in itself necessarily binding upon the Courts of the State where the land is situated.

To declare the deed to Mrs. Strange null and void, in virtue alone of the decree in New York, would be to attribute to that decree the force and effect of a judgment in rem by a court having no jurisdiction over the res."

Carpenter vs. Strange, 141 U. S. 87, 105.

12. Bullock vs. Bullock, 52 N. J. Eq., 561, 27 L. R. A., 213. (Pl. 2d brief p. 11).

We have no occasion to distinguish the conclusions of this case. The opinion of the majority of the Court

supports our claims, and Judge Garrison also would evidently have limited the South Carolina decision to its effect upon the South Carolina land. Even the actually dissenting opinion only claimed that the husband was equitably bound to do as he was ordered by the New York Court, and that though (p. 575) "The lien does not, by mere force of the exterritorial judgment, attach to lands in this State, * * * The husband has had his day in Court in New York * * * and our courts should hold that he is hereby concluded."

We add these quotations from the opinion of the Court:

P. 564; "The order simply required respondent to perform the decree by executing, acknowledging and delivering to appellant a mortgage on particular lands in New Jersey, of a form shown in a schedule annexed to the order. The order and requirement of the Court was therefore directed in *personam*, and there was no attempt to adjudicate or enforce an adjudication *in rem*.

"It is scarcely necessary to observe that a Court of New York could not have been empowered to affect, by its decree of judgment, lands lying within another state; for no principle is more fundamental or thoroughly settled than that the local sovereignty, by itself or its judicial agencies, can alone adjudicate upon and determine the status of lands and immovable property within its borders, including their title and its incidents and the mode in which they may be charged or conveyed. Neither the laws of another sovereignty, nor the judicial proceedings, decrees, and judgments of its courts, can in the least degree affect such lands and immovable property. Story, Confl. L. pp. 543, 591. The concession as to the jurisdiction of the Supreme Court of New York in this case must therefore be deemed to be limited to a jurisdiction to proceed *in personam* and not to extend to a determination, adjucation or decree *in rem*. The jurisdiction thus conceded to the Supreme Court of New York is exactly analogous to the jurisdiction which, since the decision of Penn vs. Lord, Baltimore, 1 Ves. Sr. 444, has been universally recognized as inherent in Courts administering equity.

"This recognized jurisdiction extends to making decrees in cases of equitable cognizance, such as fraud, trust and specific performance against persons brought

into those Courts, notwithstanding such decrees incidentally affect lands beyond the court's jurisdiction. But the exercise of this jurisdiction has been supported solely on the ground that it operated *in personam* only, and did not extend to the utterance of decrees *in rem*. In the leading American case, Chief Justice Marshall declared that the question was an unmixed question of title, or a case of fraud, trust, or contract. Massie vs. Watts, 6 Cranch 148. If relief cannot be effectively given by the decree *in personam*, such Courts will not retain the bill. Morris vs. Renington, 1 Pars. Sel. Eq. Cas. 387; Lindley vs. O'Reilly, 50 N. J. L. 636. Nor will the power be exerted *in personem* to compel an act affecting lands in another jurisdiction of doubtful legality. Blount vs. Blount, 8 N. C. 365. The power of such Courts to make effective such decrees is limited to its process operative upon the party, such as sequestration of property within the jurisdiction, attachment for contempt, and the like; it will not extend to validating a conveyance of the foreign lands, made by its master or commissioner, in default of the performance of the decree by the party. Watts vs. Waddle, 6 Pet. 390, Burnley vs. Stevenson, 24 Ohio St. 474. When by the process of the Court acting upon the party, obedience to the decree is enforced as by the conveyance, it is the conveyance, not the decree that affects the lands in the foreign jurisdiction. Davis vs. Headley, 22 N. J. Eq. 115" * * (p. 567) "But the question upon the solution of which this case must turn is whether the courts of New Jersey must give conclusive effect to the decree or judgment of the courts of New York made in a case where they had acquired jurisdiction of the parties but affecting lands situated here, and disposing of the title thereto in whole or in part. If this question is to be answer in the affirmative, it seems evident that we accord jurisdiction over lands in New Jersey to the Courts of other states, and, as was said by Chancellor Zabriskie in Davis vs. Headley, supra. 'leave to the courts of this state only the ministerial duty of executing their decree?' for the doctrine that jurisdiction respecting lands in a foreign state is not *in rem* but only *in personam*, is bereft of all practical force if the decree *in personam* is conclusive, and must be enforced by the Courts of the situs. If such is the effect which must be given to the judgments

and decrees of the courts of a sister state respecting lands situated here, it is extraordinary that no trace of the doctrine can be found in text-books or in adjudicated decisions. My researches have not disclosed any support of the doctrine by any text-writer of repute or by any decision in point. The very industrious counsel who maintained this view in argument has produced no authority, which in my judgment, sustains his position."

V.

The plaintiff in error is forced to claim that the South Carolina Court, as the Court of the domicile, could conclusively determine the interpretation, construction and effect of this will as to all the lands of the estate wherever situated; and he cites a number of authorities which he insists support that claim.

This claim was made and most of these cases were cited for him before the Connecticut Court. We have considered his claim at length in our principal brief, pages 23 to 47, and have also distinguished there, pages 50 to 70 the following of his citations:

Ford vs. Ford, 70 Wis., 19. (Pl. 1st brief, p. 15).
Story on Conflict laws, Sec. 479 a-h. (1 br. p. 15; 2 p. 13).
2 Greenleaf on Evidence, Sec. 671. (Pl. 2d brief, p. 16).
Van Steenwyck vs. Washburn, 59 Wis., 510. (1 br. p. 15).
Harrison vs. Nixon, 9 Peters, 404. (1 br. p. 15; 2 p. 13, 21).
Trotter vs. Trotter, 4 Bligh, (N. S.) 502. (1 br. p. 15).
Chamberlain vs. Napier, L. R. 15, Ch. Div., 614. (id).
Caulfield vs. Sullivan, 85 N. Y., 153. (2d br. p. 14).
Dammert vs. Osborn, 140 N. Y., 30. (1 br. p. 23).
Maxwell vs. Maxwell, 2 D. M. & G., 705. (2 br. p. 15).
Orrell vs. Orrell, L. R. 6 Ch., 302. (Pl. 2d brief, p. 15).
Guerard vs. Guerard, 73 Ga., 506. (Pl. 1st brief, p. 23.)
Donelli vs. Donelli, 4 Bush, 51. (Pl. 1st brief, p. 23.)

We add as to the other citations now made by the plaintiff in error in connection with his above claim:

I. The Amer. & Eng. Ency. Law Vol. 3, is referred to by his counsel upon one or two points, but their

quotations therefrom must be reconciled with the following quotation from the same book, page 565, to give them any application.

"All instruments and contracts conveying or affecting the title to real estate must be executed in the form and with those solemnities prescribed by the law, where the land is situated, in order to have any validity; and such contracts and instruments are to be *construed* and *given effect to* by the law of the situs."

We also call attention to the qualification admitted by **Bigelow in his note to Story on Conflict of Laws, 651,** as quoted for the plaintiff in error: "In such a case, the question being simply one of the *intentions expressed* in the will and not of the *validity* of the *dispositions*, it is evident that the word expresses the same intention as to all the property or real estate whereever it may be."

2. **Anstruther vs. Chalmer, 2 Sim. 1.** (Pl.2d br.p.15). This case concerned personal property only. And may we not besides deem it an authority in our favor? The will being one of personalty only, was construed by the law of the domicile, and not by the law of the place where made whose technical provisions were employed, presumably (under those circumstances), because the law of the domicile was to govern in the disposition of the estate. Under that case, mutatis mutandis, would not a will of real estate be construed by the law which governs the disposition of the realty, whether or not any provisions might have been taken from the law of the domicile?

3. **Story on Equity, Sec. 744,** cited for the plaintiff in error, (2d brief, p. 17) to the effect: "The incapacity to enforce the decree in rem constitutes no objection to the suit," also says, earlier in the same section, by way of a premise: "It is sufficient that the parties to be affected and bound by the decree are resident within the state or county where the suit is brought;" and in Sec. 744, (a) (12th Ed.) "It has recently been determined in America after a full review of all the authorities, that a Court of Equity has no jurisdiction in cases touching lands in foreign countries, unless the relief sought is of such a nature as the Court is capable of administering in

the given case; a Court of equity has not necessarily jurisdiction over a subject of ordinary Equity cognizance, simply because the parties are within the forum."

4. McGregor vs. McGregor, 9 Iowa, 65. (Pl. 2d brief, p. 19-20.) This case is cited and quoted from in behalf of the plantiff in error; but taken in connection with the later cases of Acker vs. Priest, 92 Iowa, 610, 616, and Blackman vs. Wright, 96 Iowa 541, we think they will prove authorities in our favor.

5. I. Redfield on Wills Chap. IX, Sec. 15, p. 405. (Pl. 2d brief, p. 20), is quoted for the plaintiff in error to the effect that the law of the domicile will govern as to what shall be regarded as personal and what real estate. How would this be applied in this case? There could be no question as to the physical character of the Connecticut lands before the judgment of the South Carolina Court. Will the plaintiff in error claim, that this author would give the South Carolina Court jurisdiction of the Connecticut lands, to determine the effect of the will upon those lands and whether they were converted by the will from real to personal property, because as the Court of the domicile it could determine whether the property of the estate *to be acted on by the will was in fact real or personal property?*

How would the plaintiff in error reconcile such a claim with the other rule previously stated by this author in Section 8, p. 398; "It is scarcely necessary to state, that in regard to real property, the mode of execution, *the construction*, and the validity of a will must be governed, exclusively, by the lex rei sitae."

Or with the law of his own State—Lamar vs. Scott, 3 Strob. (S. C.) 562—to the effect that the lex loci rei sitae governs where the controversy relates to "what are to be deemed immovables."

6. Perkins Note to 1 Jarman, 1-2d Amer. Ed. (Pl. 2d brief, p. 22), is cited as dissenting from the text, as to the law of what place governs the interpretation and construction of wills, and is claimed to agree with the plaintiff's view, that the law of the domicile governs. In the 5th Amer. Ed. p. 2, the same note appears,

"Quaere, whether this statement (of the text) is not too broad as to the construction of such wills." And 2 Greenleaf Ev. Sec. 671, and Story Conflict Laws, Sec. 479 h are cited as the cause of the queary; but the note goes on to say: "It would seem to be settled now however in England and the United States, that in matters that concern the succession to personalty, the lex domicilii of the deceased is to control, while on the other hand it is maintained that as far as the descent and heirship of reality is concerned, the lex rei sitae determines it finally."

Schouler on Wills, 2d Ed. reaffirms Jarman's text by referring to that author and Judge Story among his authorities for the following rule which he gives:

Sec. 491. "Real and personal property are to be distinguished in the interpretation of a will. As to real property, the well settled rule of England and the United States is, that, no matter where the will was made or in what language written, the law where the land lies must govern in the construction of the will as well as in its method of execution."

7. **Mullen vs. Reed, 64 Conn., 247.** (Pl. 2d brief, p. 20). **Rockwell vs. Bradshaw, 67 Conn. 14,** (id).

These cases are readily distinguishable in principle and application from the case at Bar, as will be seen from a more extended examination. The very case in question here, Clarke vs. Clarke, 70 Conn., 195, must be conceded to be both later and more nearly in point. The Connecticut court in this later case did not deem it needful to distinguish those former decisions.

8. **McElrath vs. Pitts. & Steub. R. R. Co., 55 Penn. St. 189.** (Pl. 2d brief p. 22.)

The Court in its opinion seems to understand better than the plaintiff in error what it attempted to do:

P. 209. "Without deciding what estate would pass by the trustee's sale under the mortgage, we are of opinion that we can by our decree operating upon the trustee, authorize and compel him to sell and convey

whatever interest of the railroad company will pass under the terms of the mortgage."

The later case of Lynde vs. Columbus C. & I. C. Ry. Co. 57, Fed. 993, shows the limited application of such action, and we refer to it as a well fortified authority upon the power of foreclosing such mortgages.

We also in this connection cite the case of Pitts. & State Line R. R. Co. vs. Rothschild 1 Pa. C. C. R., 620, 4 At. Rep. 385, 4 Cent. Rep. 107, a later Pennsylvania case which shows an extended examination of the authorities upon this point.

9 Muller vs. Dowes, 94 U. S, 444. (Pl. 2d brief, p. 22.) This case is also cited for the plaintiff in error to support his claim of foreign control of local real estate by foreclosure.

The Court says, p. 449: "It is here undoubtedly a recognized doctrine that a Court of equity sitting in a state and having jurisdiction of the person, may decree a conveyance by him of land in another state, and may enforce the decree by process against the defendants. True it cannot send its process into that other state, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title."

How would the plaintiff in error apply this authority? How would he compel Nancy to transfer her Connecticut real estate? She herself cannot do it. A South Carolina decree cannot do it; neither can a South Carolina guardian; nor even a Connecticut guardian excepting by authority of a Connecticut Court and Connecticut law, which would not authorize such a transfer to South Carolina. Would he have the South Carolina Court imprison Nancy until she becomes of age? How would he restrain her Connecticut guardian meantime?

10. Adams vs. Farley, 18 So. Rep. 391. (Pl. 2d brief, p. 23). In this case personal property only was involved.

11 Crusoe vs. Butler, 36 Miss. 150. (Pl. 1st brief, p. 22.) This case has been already distinguished in our principal brief, p. 62, and in the opinion of the Connec-

ticut Court, but the Counsel for the plaintiff in error seem to lean so hard upon that slender and twisted prop that we cannot refrain from touching it again as we pass. However much they may claim the Mississippi Court yielded here to a previous interpretation of the testator's meaning by the Alabama Court in a suit between the same parties or their privies, they must reconsider their claim with the following conclusion also stated in the same opinion.

P. 168: "It is not to be supposed that it was the intention of the Act of Congress to give another State presumed to be unacquainted with the laws of the State where the lands are situate the power to establish a conveyance and by the judgments of its Courts render it effectual to pass the title; for that would give to a foreign tribunal power to establish a conveyance and adjudge the title to land in another state contrary to the positive laws of that state.

It is much more reasonable to suppose that the act was intended to apply to judicial proceedings affecting rights of a *personal* or transitory character and this we consider the proper construction of it."

In this connection it is interesting to note that the misapplied expression in this Crusoe vs. Butler case upon which the plaintiff in error relies, apparently afterwards became troublesome in Mississippi, for the subsequent decisions and the subsequently enacted code, referred to bottom p. 63, and top p. 64, of our principal brief, have put a summary end to its adventitious authority there.

We also call attention to another earlier and clearer statement of the Mississippi law, in the case of Doe vs. Wynne, 23 Miss. 251, which was in no way distinguished or modified in the later case above, but is doubtless the law of that state today.

P. 253: "As the land is situated in this state, the rights of the parties to it must be determined by the law of Mississippi, although the testator was domiciled in Tennessee at the date of the will, and at the time of his decease."

P. 256: "The argument has been pressed upon us, that as by the law of Tennessee at the date of the will, the

testator can not devise after-acquired land, we must presume that it was not his will or intention that they should pass by the devise. But this argument is not entirely tenable. The cases in the books are numerous where the intention of the testator to convey was manifest, but where that intention could not prevail, because it controverted the case."

P. 257: "But it is clear to our minds, that, as the will manifestly shows, that the intention of the testator was to give to his wife all the property of which he might die seized, whether owned at the date of it, or subsequently acquired, that intention must prevail and be carried into effect by the Courts of this state in regard to realty situated here, there being no question whatever that the power existed under our laws to make such a will. We are therefore of opinion that the defendant in error is entitled by the laws of this state to the lands in controversy."

12. **Levy vs. Levy,** 33 N. Y., 97.

Virginia vs. Levy, 23 Gratt. (Va.), 21 (Pl. 2d br. p. 18-9).

The second of these two cases concerning the same will is cited for the plaintiff in error in support of his claim that the Court of the domicile may construe a will of foreign real estate.

A large amount of real and personal property in New York and the plantation of Monticello in Virginia were given by a New York will to the United States in trust for certain purposes. If the United States would or could not undertake the trust, the State of Virginia was named as Trustee in its place. The executors brought suit in New York for a determination (inter alia) of the validity of this trust. All persons in interest including the United States appeared and were made parties. The United States appeared and defended the validity of the trust provision.

The New York Court said in part, p. 136:

"The subjects of the trust are the real estate (Monticello) in Virginia, and real and personal estate in New York. The validity of the devise of the land in Virginia depends on the law of that State. As to the estate real and personal, in New York, it depends on the law of New York, because as to the real, New York is the locus rei

sitae; as to the personal, the locus domicilli. The law either of Virginia or New York being hostile to the limitation, it is, I think, wholly void. The testator's plan embraces and requires *all* the property.

* * * * * * * * *

"It was proved upon the trial and found as a fact by the Judge, that according to the law of Virginia a trust in lands, such as the one in question, is void." * * *

"My conclusions are that the devises and bequests of the residue of the real and personal estate of the testator (being the lands and personal estate in New York), upon the trust specified in the will, are invalid for the reasons": [1st. The disposition violated legal rules. 2nd. There is no competent Trustee. 3rd. The disposition creates a perpetuity]. "4th. The bulk of the property devised and bequeathed (the lands in this State) is subjected to a trust that cannot legally be created. 5th. The devise of the farm and estate at Monticello, in Virginia, the designated site of the school, is by the law of that State void.

By the law both of New York and Virginia, the trust limitation is invalid. It were quite enough, however, that the law of this State is in hostility to it. The trust failing as to the real and personal estate in New York appropriated to erect, endow and maintain the school, the devise of the Monticello farm in Virginia, as the site of the institution, fails also. The purpose and intent of the testator cannot be effectuated, and therefore every part of the scheme fails."

Some of the heirs, after the war, brought suit in the Courts of Virginia for the disposition of the real estate there as not affected by the trust. To this case the State of Virginia was made a party. The Virginia Court held:

First, (p. 34). That the United States was a "Competent and sufficient" trustee, and had not declined the trust, but had apparently accepted it and therefore the State of Virginia had no interest in the matter.

Second, (p. 37). That the New York decision was conclusive everywhere as to the real and personal property in New York.

Third, (p. 38). That the trust provision being void as to the New York property became incapable of execution anywhere even if valid in Virginia. And, *lastly:* That

the New York decision was right in principle and correctly announced the Virginia law.

We fear that this case alone would not adequately establish our adversaries contention.

13. **Boyes vs. Bedale, 1 Hem. & M., 805.** (Pl. 2d brief, p. 24).

This is the last case cited for the plaintiff in error, and is a broken reed for them to rest upon. As stated in our principal brief, page 61, it was over-ruled in the subsequent case of Re Goodman's Trusts, L. R., 17 Ch. Div., 266, 299; and we add that it was subsequently over-ruled again, with additional emphasis, in Andros vs. Andros, 24 Ch. Div., 637.

The Counsel for the plaintiff in error claim that the case at Bar is the only case, so far as their investigation goes, which denies the jurisdiction of the Courts of the domicile to determine the title to lands in another state by a conclusive construction of the muniment of title.

We beg to again refer them, and this Honorable Court, to some of the goodly company supporting Connecticut in its contention. Some of the numerous other cases where its power to construe foreign dispositions of local real estate is either directly applied, or asserted by the Court of the situs.

1 Redfield on Wills, 398.
1 Jarman on Wills, 1.
Schouler on Wills, Sec. 491.
3 Amer. & Eng. Ency. Law, 565.
Wharton on Conflict of Laws, Sec. 555.
Dicey on Conflict of Laws, 527–8.
U. S. vs. Crosby, 7 Cranch, 115–6.
McCormick vs. Sullivant, 10 Wheaton, 192, 202.
Watts vs. Waddle, 6 Peters, 389, 401.
Watkins vs. Holman, 16 Peters, 25, 57.
Suydam vs. Williamson, 24 How., 427–33.
McGoon vs. Scales, 9 Wall, 23, 27.
U. S. vs. Fox, 94 U. S., 315, 320.
Brine vs. Ins. Co., 96 U. S., 627, 636.
DeVaughn vs. Hutchinson, 165 U. S., 566, 570.
Jennings vs. Jennings, 21 Ohio St., 56, 76.
West vs. Fitz, 109 Ill., 425, 440.
Smith vs. Smith, 174 Ill., 52, 58.

Lynch vs. Miller, 54 Iowa, 516.
Richardson vs. DeGiverville, 107 Mo., 422, 433.
Kerr vs. White, 52 Ga., 362, 370.
Tierson vs. Williams, 57 Miss., 451, 463.
Williams vs. Mans, 6 Watts, Pa., 278-9.
Nelson vs. Potter, 50 N. J. L., 324-5.
Davis vs. Headley, 22 N. J. Eq., 115.
Danner vs. Brewer, 69 Ala., 191, 203.
Cantu vs. Bennett, 39 Tex., 304, 309.
Williams vs. Nichol, 47 Ark., 254.
Sedgwick vs. Laflin, 10 Allen, 430.
Bovey vs. Smith, 1 Vernon, 84.
Brodie vs. Barry, 2 Ves. & B., 127.
Robinson vs. Bland, 2 Burr., 1077, 1079.
Nelson vs. Bridport, 8 Beav., 547, 570.
Freke vs. Lord Carberry, L. R., 16 Eq. Cas., 461, 5, 6
Harrison vs. Harrison, L. R., 8 Ch. App. Cas., 342.
Fenton vs. Livingston, 3 Marcq. App. Cas., (497, 548.)

We also add further references to some cases cited but not quoted in our principal brief. These cases support our contention either directly or by necessary implication—directly where the Courts of the domicile had already construed the will—by necessary implication where the Courts of the situs construed the will by their own laws without reference to the laws or decisions of the domicile.

And both classes of cases are equally in point, since the only reason given by the plantiff in error for the qualification of the usual rule is that the will was made with reference to the local conditions of the domicile—in this case its laws of construction—which conditions (laws), if they are to control at all, should be equally controlling whether the Court of the domicile has acted first or not.

White vs. Howard, 46 N. Y. 144. (1871).
White vs. Howard, 38 Conn. 342. (1871).

Two cases concerning the same will and estate. The testator was domiciled in Connecticut. The New York Court construed the will, so far as it concerned New York land, as to the question of conversion, whether the daughter took a

vested estate or merely a beneficial interest, and as to the validity of the devise in remainder.

The New York Court said in part:

> "In addition to his personal property and real estate situated in Connecticut, the testator at the time of his decease was seized of real estate situated in the city of New York of great valve. The validity of the devise of the latter property, and *all questions relating to the title*, must be determined by the laws and Courts of New York, irrespective of the domicile of the testator."

It was claimed that a power of sale was implied, and that all the property was converted under the will, and should therefore be disposed of under the Connecticut law. The Court thought, considering the bulk of the real estate was in New York, that if the testator intended a power of sale of it he would have expressed it; and after considering the question of conversion, concluded: "There can be no pretense of any conversion of the New York real estate under the rule in the present case."

The Court also held that moneys invested in New York real estate under the will must be treated as real estate. "In such cases we have seen that after the investment is in fact made, the nature of the property is changed, and that the heir, instead of the personal representatives, are entitled to it. International comity has nothing to do with titles to real estate. They are regulated exclusively by the government where the real estate is situated." The Court also held that certain New York societies could not (because of the Statute of Wills) take the devises in remainder.

The Connecticut Court did not question in any respect the propriety of such action by the New York Court, but held that the New York societies could take a devise of Connecticut lands, as there was no prohibition in their charters, and they had the power to hold and convey real estate.

Penfield vs. Tower, 1 N. Dak. 216. (1890).
Lee vs. Tower, 124 N. Y. 370. (1891).
In re Tower's Estate, 49 Minne. 371. (1892).

Three cases concerning the same will and estate. The testator was domiciled in Pennsylvania and owned land also in the other three States mentioned.

It was conceded that the trusts under the will were valid under Pennsylvania laws as to both personal and real estate.

The North Dakota Court held that if this land was converted under the will it was for the Courts of Pennsylvania—the testator's domicile—to decide as to the validity of the trust in question; but if there was no conversion, it was to be decided in the local Court. The Court considers the question of conversion at considerable length, under its own laws, and concludes:

> "We therefore hold that the real estate was not equitably converted into personalty; that the trust as to the real property within this State is to be construed by the laws of this State; and that under those laws it is void because it unlawfully suspends the absolute power of alienation."

The New York Court said in part as to the validity of the trusts and the question of conversion:

> "We agree with the conclusion reached by the learned General Term, as well as the reasoning on which it was founded."

And upon this point the General Term said in part: (Lee vs. Tower, 12 N. Y. Supp. 240, 58 Hun. 606 *Mem*):

> "That the provisions of the will in question are repugnant to this statute (perpetuities), and the trust therefore invalid, as one relating to real estate, * * * is practically conceded by the defendants. They, however, claim that this is a case where the doctrine of equitable conversion should be applied, so that the will should be construed as if the whole estate were personalty, and that upon this theory the law of the State of Pennsylvania would govern in the construction, and the trust under that law be valid. * * * It seems to be conceded on the part of the plaintiffs that, if there is an equitable conversion, the will is governed by the law of Pennsylvania, and therefore valid. The question to be determined, therefore, is whether or not there is here an equitable conversion."

Then after citing and applying a number of precedents, wholly New York cases, the Court concluded:

> "The foregoing considerations lead to the conclusion that there is here no sufficient basis for saying that the testator intended that his real estate should at all events be sold and converted into personalty," and as there was no equitable conversion held the trusts invalid under the statue against perpetuities.

The Minnesota Court considered that the will would not be invalid in Minnesota as to personal property, or as to Minnesota lands if the trustees had an absolute power of sale, saying in part:

> "The power to sell and convert the real estate was a necessary complement to the provisions of the will for the management of the estate. If the power of alienation by the trustees is to be treated as equivalent to that of the absolute owner of the real estate, then there is no suspension of the power of alienation." * * *
>
> "When the trustee is empowered to sell the land without restriction as to time, the power of alienation is not suspended, although the alienation in fact may be postponed by the non-action of the trustee or in consequence of a discretion reposed in him by the creator of the trust." * * * "Hence we conclude that the trust was not invalid, because it was lawfully constituted as to the personalty, and as to the lands also not in contravention of the statute, for the reason that they are convertible at any time by an authorized sale."

Counsel for both sides cited the decisions concerning the same will in North Dakota and New York, and distinguished or relied upon them according to their respective interests, but neither seemed to consider them as controlling authorities.

It will be noticed that neither of the three Courts of North Dakota, New York and Minnesota, in the principle cases, considered it needful or appropriate to either refer the question of conversion to the Pennsylvania Court, (the domicile), or, in deciding the question themselves, to attempt to apply the Pennsylvania laws.

Applegate vs. Smith, 31 Mo. 166 (1860).

By a will executed in Kentucky a testator domiciled there devised to his wife his whole estate, real, personal and mixed "wherever situate." He subsequently acquired lands in Missouri.

The Court said in part:

"The only material point in this case is whether the after-acquired lands passed by the devise to Martha Applegate.

"The will was made in Kentucky, and by the law of that State there must be something in the will itself which showed that after-acquired lands were intended to be passed by it in order that it may have that effect.

"A general devise of all his property, or all of his estate, or a general disposition of his land, will not authorize such a deduction.

"But his intention to devise whatever interests he may own in land at his death must be disclosed by the language used, or by the actual import of the provisions contained in the will. (10 B. Mon. 2).

"Story, in his conflict of law, speaking of wills of immovable property or lands, (Sec. 474) says that the law of the place where the property is locally situated is to govern as to the capacity of the testator, the extent of his power to dispose of the property, and the forms and solemnities to give the will or testament its due attestation and effect.

"According to this principle we are to construe the will with an eye to the laws of Missouri, so far as the land situated within her limits is concerned.

"We consider that the case of Ligget vs. Hart, 23 Mo. 127, settles the one now under consideration. That case determines that the power over the after-acquired lands possessed by the testator is the same as that which he possesses over lands which he owned at the making of the will, it is just the same and to be determined on the same considerations as would determine the question whether lands owned by the testator at the date of his will passed by it, or, in other words, that after-acquired lands, as to the power of disposition, rests on the same

ground as the lands owned by the testator at the date of his will and the personal estate. According to this there can be no question but that the lands in Missouri passed by the will."

We call attention again in this connection to the similar case of Doe vs. Wynne, 23 Miss., 251, which appears to place that state also firmly in the same line despite the plaintiffs claims concerning it.

The rule in the case first above should control in the case at Bar. It is for the Connecticut Court to say how certainly the intent must appear in the will, or how necessarily it must be implied, to work an out and out conversion of Connecticut lands, and whether such certainty does appear or is so necessarily implied.

Hale vs Hale, 137 Mass. 168. (1884).
Hobson vs. Hale, 95 N. Y. 588. (1884).
Hale vs. Hale, 125 Ill. 399. (1888).

Three cases concerning the same will and estate. The testator was domiciled in Massachusetts and left a large estate, including lands in each of the three States mentioned.

The Massachusetts Court did not seem to consider anything except the effect of the will as to a specific devise therein of certain Massachusetts real estate; and this is remarkable, if in the opinion of the Massachusetts Court or the distinguished counsel employed, the question of conversion, which was considered so important in the cases in the two other States, should properly have been determined by the Massachusetts Courts or under the Massachusetts laws.

It was claimed in the New York Court that a case of equitable conversion by implication, from the testator's death, for the purposes of investment and distribution, was presented in his general disposition in the residuary clause of the will; and that was the principal question in the case there. That Court considered it at length, and concluded that there was no conversion under the will. The Court reviewed several New York precedents applicable to the question, and evidently based its decision upon the New York precedents alone.

The Illinois Court, in determining the case, also considered the question of conversion, arising under the same general residuary clause, and after defining what intent to convert the will must show to work a conversion, concluded that such an intent did not appear, and continued, saying in part:

> "This precise question was presented to the Court of Appeals of the State of New York by the same parties to this litigation and in an action brought by these executors and trustees, to obtain a construction of certain provisions (same in question in Illinois) of the last will and testament of Ezkiel J. M. Hale, deceased; that Court held after a most elaborate argument, the will, while valid under the laws of Massachusetts, where the testator died and where his will was admitted to probate, contained no express direction for the conversion of the real estate into personalty, or for the sale of the real estate. (Hobson vs. Hale, 95 N. Y. 588). This Court is entirely satisfied with the conclusion reached by the Court of Appeals in that case; and the elaborate discussion there given, to the exact question involved in the case now being considered, would seem to relieve the Court from the necessity of any extended consideration of the question."

There was no suggestion of any deference to the laws of Massachusetts, or to the propriety of any foreign interpretation.

Wurts vs. Page, 19 N. J. Eq. 365. (1869).
Pages Estate, 75 Penn. St. 87. (1874).

Two cases construing the same will. The testator was domiciled in New Jersey and owned real estate in both states. All the real estate in New Jersey had been sold, and most of that in Pennsylvania.

One daughter had married and died subsequent to the father's death. She had been domiciled in Pennsylvania, and her husband was the administrator of her estate in each of the two states, and was a party in each case.

The fourth question was whether the will worked an equitable conversion of the unsold real estate into personalty.

If there was a conversion, the daughter's husband claimed the whole of her share through his marital rights, otherwise it went to her children.

The New Jersey Court considered whether there was any such *express* direction to convert or sell, as worked such a conversion, and concluded:

> "If this were the only part of the will to guide us, the real property could not be considered as converted into personal property until actually sold. But the question of conversion is a question of intention, and the real question is, did the testator intend his lands should be converted into money at all events before its distribution? In this case it seems to me that the directions in other parts of the will show clearly that he did so intend." * * * "All these directions show that he intended that his estate should be converted into money before it was distributed by his trustees; and they would be required to convert it into money before distribution, and to pay it over in that form."

The Supreme Court of Pennsylvania in subsequently construing the same will in settling the daughter's estate, disagreed with the New Jersey construction above. The lower Court had apparently followed the New Jersey decision and had decided that there was a conversion; but this decision was reversed by the Supreme Court. A full statement of the action and decree of the New Jersey Court is set out in the record of the Pennsylvania case, but the latter Court decided contra, that there was no conversion.

The Pennsylvania Court concluded in part:

> "The whole frame of the will, and especially the fourth item, would seem to us to indicate no more than a discretionary power of sale, which would work conversion only when a sale should be made. Hence, on the death of the testator, the real estate passed to his children as real estate, by equitable titles, not as personalty. Mrs. Page having died before actual conversion under the discretionary power contained in the fourth item, her equitable estate decended to her children as realty."

And in a previous part of its opinion the Pa. Court said:

"The question of the conversion of the real estate in Pennsylvania, devised to Mrs. Page, must depend on the will of Wm. Wurts, there being no actual conversion by the trustees under his will in her life time. It, therefore, descended as real estate, unless conversion was wrought by the will itself.

"It has been decided in New Jersey that a conversion arises under the terms of Wm. Wurts' will. We dissent from this with much unwillingness and some hesitation.

"We agree that a conversion may arise, without express terms, when it is clear that a testator meant to create a fund raised out of both real and personal estate, and to bequeath this fund in money alone. But it seems to us the error in this argument is in assuming the only fact from which conversion can fairly be inferred, to wit: An absolute intent to create a consolidated fund out of both real and personal estate, to be distributed in money."

The above case seems quite in point. The Court of the domicile said the father's will implied a conversion. The Court of the situs, subsequently, in settling the daughter's estate, said the father's will *did not* effect a conversion.

Butler vs. Green, 65 Hun. 99, (1892).

The testator was domiciled in New York and left a large estate, including a large amount of real estate in New Jersey and Illinois. Part of the real estate in the two latter States had been sold and the proceeds brought into New York and the question was whether these proceeds could be lawfully held under the trusts in the will, or were intestate, since the trusts would be invalid under the New York statutes against perpetuities.

The Court says in part:

"Mr. Ogden died in this city, and as to the personal property of which he was then possessed the law of his domicile governs. All questions with regard to his real estate must, however, be determined by the lex loci rei sitae. * * * *

"The solution of this question depends primarily upon the intention of the testator. Did he purpose that the attributes of his real property in Illinois and New Jersey should depend upon the will of his executors? The presumption in general is that a testator does not intend the nature of the property to depend upon the option of the person through whom the conversion is to be effected."

And the Court, after considering the question of conversion at some length, concludes:

"It is entirely clear that no equitable conversion was effected at the death of the testator. * * *

"We have discussed this question of conversion as though it were governed solely by the law of this State. This is, we have considered it so far as to determine whether the law of the domicile should act upon the moneys which have been brought into this State. We think, however, that the question is one which should appropriately be determined by the law of Illinois and New Jersey. It is not only the title to real property which is governed by the lex loci rei sitae, *but also the effect and construction of the instrument conveying it.*" * *

"The intention of the testator is to be gleaned from this instrument—that is from the will; and the Courts of the locality have jurisdiction to construe the instrument and to determine all questions which may arise with regard to the title to the property and the rights of the devisees with respect thereto. These questions should be determined by the Courts of the locality so long as the subject matter, whether in the form of real estate or its money representative, is within its jurisdiction.

Where, however, such money representative has been brought within the jurisdiction of the domicile, its Courts should regard the laws of the locality and determine the questions thrust upon them in accordance with such laws."

The above case is especially strong in support of our claim that the courts of the situs have the exclusive right to say whether or not an equitable conversion is to be implied, since it is a statement to that effect by the Court of the domicile itself.

Osburn's Appeal, 104 Pa. St. 637. (1883).
McCartney vs. Osburn, 118 Ill., 403, (1886).
McCartney vs. Osburn, 121 Ill., 408, (1887).
Warner's Estate, 130 Pa. St., 365, (1889).

All concerning the same will and estate. The testator was domiciled in Pennsylvania and owned real estate in both states.

The questions were: Whether under the provision "to be equally divided between the heirs of the said Henrietta that may be living at the time of said distribution and the said Harry G. McCartney, each to share and share alike," the division was to be per stirpes or per capita; whether "heirs" meant "children" or "heirs-at-law" at Henrietta's death, and finally as to the time when the estate was distributable.

The Pennsylvania Court held that "heirs" meant "heirs-at-law;" that the division was per stirpes; and subsequently in the last case, after the Illinois decision, that the distribution might be made at once. The Illinois Court held that "heirs" meant "children;" that the division was per capita, and that the distribution was to be deferred until the youngest child arrived at twenty-one.

The claim also was made in the Illinois Court that the previous decision of the Pennsylvania Court, between the same parties, was conclusive, as well as correct on principle. The counsel for the appellant claimed in the Illinois Court that: "The will should be construed by the laws of the domicile of the testator, and hence the construction put upon the will by the Courts of Pennsylvania should control" and that "the law of the domicile prevails in the interpretation of wills of real estate" citing among other cases: Story on Conflict of Laws, 479 h; Trotter vs. Trotter 4 Bligh, 502; Enolim vs. Wylie 10 H. L. Cas. 1, Crusoe vs. Butler, 36 Miss. 150, Danelli vs. Danelli, 4 Bush 51; and Bible Soc. vs. Pendleton, 7 W. Va. 79.

The Illinois Court said in part:

> "Before a former decision can be successfully invoked as an estoppel in another suit between the same parties,

it must appear that the question is the same in both cases, and that the Court in the former suit had power and jurisdiction to determine it. The controversy here is about the quantum or extent of interest which the parties respectively have in certain lands in the State of Illinois, and the question to be determined as respects the appellant is whether he has a half interest or merely one-ninth.

"As respects the appellees, the question is whether they are each entitled to a ninth or a sixteenth only. It is manifest the Courts of Pennsylvania had no power or jurisdiction to pass upon either of these questions, nor did they attempt to do so. It is true they passed upon a question like these, and the decision upon them as an expression of opinion by that Court is entitled to the highest respect, but that is all. While the decision of that Court is persuasive, it is not imperative. Nor does the fact that this Court, in passing upon these questions, may place a construction upon the will different from that adopted by the Pennsylvania Courts which will lead to a diversity of interests between the devisees in the two States in respect to the same kind of property, make any difference. Such a contingency is the inevitable result of the complete independence of the Courts of the two States in matters within their exclusive jurisdiction.

"The will, through which all the parties claim, is the written evidence of their respective titles and interests in and to the land sought to be partitioned, and the construction to be placed upon it presents a question of law which this Court must determine for itself. While it was entirely competent for the Pennsylvania Courts to construe the will and determine the rights of the parties to the property there, yet they could make no order, decree or ruling with respect to the legal effect of the will, that would deprive this Court of the right to construe that instrument for itself, so far as it relates to lands in this State. Where a testator by a single will devises lands lying in two or more States, the Courts of such States will respectively construe it, as to the lands situated in them respectively, in the same manner as if they had been devised by separate wills."

The same Court, when the same case came up the second time, (121 Ill. 408) again said in part :

> "The decision in that case, (104 Pa. St. 637), on the plainest principles of law conclusively settled the rights of the parties to so much of the realty devised as lies in Pennsylvania, and to the entire personal estate wherever situated or found, but it did not affect the title of the real property outside of that State."

The Pennsylvania Court subsequently, when the same case came up there the second time (130 Pa. St. 365) also affirmed its original decision.

The above case seems to be fully in point here; since it was wholly a question of testamentary construction between the same parties in each state, and the appellants made the same claims in the Illinois Courts made by the plaintiff in error here, namely, that the construction by the Court of the domicile, in a suit between the same parties, should control, and that the will should be interpreted by that law, and even cited most of the authorities relied on by the plaintiff here. Yet the Illinois Court decided otherwise in the manner and for the reasons stated above.

The Connecticut Court in the case before it, might well have paraphrased the criticism of the Lord Chancellor in Arglasse vs. Muschamp, 1 Vern. 75, 77.

This is surely only a jest put upon the jurisdiction of the Connecticut Court by the plaintiff in error; for when it goes about to determine the status of the Connecticut land, he readily tells it that the status of that land has been already determined by the South Carolina judgment; but when it replies that the South Carolina Court was without the jurisdiction to determine the status of Connecticut land, he says that the South Carolina Court acted only in personam and did not attempt to determine the status of any land.

All of which is respectfully submitted,

JOHN H. PERRY,
WINTHROP H. PERRY,
Counsel for said Defendants.

Statement of the Case.

A guardian *ad litem* was appointed for the infant defendant, who duly answered, and, after hearing, the court decreed that the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personalty at the time of her death of all her real estate of whatsoever description and wheresoever situated; that the plaintiff as executor should receive, administer and account for the same as personalty; that he was, by the said will, authorized and empowered to sell and convey the same for the purpose of executing the will, and leave was given to apply for further orders and directions upon the foot of the decree. This judgment was, upon appeal, affirmed by the Supreme Court of South Carolina. 46 South. Car. 230.

The controversy in the courts of Connecticut was commenced by the filing, in the probate court for the district of Bridgeport, of a petition on behalf of Henry P. Clarke as administrator of the estate of his deceased daughter Julia Clarke, he having been appointed such administrator by the proper court in Connecticut. In the petition it was recited that Julia had died intestate, leaving *real estate* in the district, and that divers persons claimed to be entitled to have the said real estate set apart and distributed to them, and the court was asked to hear the claims of said parties and ascertain to whom the estate should be apportioned. A guardian *ad litem* having been appointed by the court for Nancy B. Clarke, the application was heard, and a decree was entered finding that she was the sole heir and distributee of her deceased sister Julia. The Connecticut law, which devolved on Nancy the whole of the real estate of Julia, differed from the law of South Carolina, by which the estate of Julia, both real and personal, passed equally to the father and to Nancy the surviving sister.

Henry P. Clarke, individually, appealed from the decision of the probate court to the Superior Court of the county of Fairfield. That court filed its findings stating the facts concerning the controversy, and reserved the resulting questions of law to the Supreme Court of Errors of the State, which court recommended that the decree of the probate court be affirmed. 70 Conn. 195. Thereupon the Superior Court of Fairfield County entered a decree in conformity to the mandate to it directed.

In the body of the decree the court referred to the contention between the parties, and stated the one pertinent to the issue now before us, as follows:

"Upon the facts aforesaid the appellant claimed and contended that the decision and decree of the Circuit Court for the Fifth Judicial Circuit of the State of South Carolina, being the Court of Common Pleas and general sessions for Richland County, affirmed by the Supreme Court of said State, 46 South Car. 230, in the case of Henry P. Clarke, executor and trustee, against Nancy B. Clarke, in its interpretation and construction of the will of the said Julia H. Clarke, to the effect that said will worked an equitable conversion into personalty at the time of her death of all the real estate of the testatrix, wherever situated, was binding and conclusive on the courts of this State in his favor in this proceeding, and that to hold otherwise would be to deny full faith and credit to the judicial proceedings and judgment of the State of South Carolina, and would be in contravention of section 1, article 4, of the Constitution of the United States."

An appeal was taken from the decree of the Superior Court. The Supreme Court of Errors of Connecticut, although it remarked that the appeal was unnecessary, as its prior judgment had settled the controversy between the parties, yet entertained the appeal, and affirmed the decree below. 70 Conn. 483.

Mr. Samuel F. Phillips and *Mr. Leroy F. Youmans* for plaintiff in error. *Mr. Frederic D. McKenney* was on *Mr. Phillips's* brief.

Mr. John H. Perry for defendants in error. *Mr. Winthrop H. Perry* was on his brief.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

The Supreme Court of Errors of Connecticut held that the will of Julia H. Clarke, wife of the plaintiff in error, did not at the time of her death work an equitable conversion into per-

sonalty of the real estate situated in the State of Connecticut, and, consequently, that though personal property might be governed by the law of the domicil, real estate within Connecticut was controlled by the law of Connecticut, and hence that Nancy B. Clarke, as surviving sister of Julia Clarke, inherited, under the laws of Connecticut, to the exclusion of the father, the interest of the deceased sister Julia in the real estate in Connecticut which had passed to Julia by the will of her mother. It is assigned as error that in so deciding the Connecticut court refused full faith and credit to the decree of the courts of South Carolina, wherein it was adjudged that the will of Mrs. Clarke had the effect of converting her real estate, *wherever situated*, into personalty; the deduction being that as under the South Carolina decision the real estate situated in Connecticut became personal property, it was the duty of the Connecticut court to have decided that the land passed by the law of South Carolina and not according to the law of Connecticut, and hence, that instead of treating the daughter Nancy as the owner of the whole of the real estate, it should have recognized the father as having a half interest therein. And the correctness of this proposition is really the only question which the assignment of errors presents for our decision.

The argument at bar has taken a wide range, and the various legal principles by which it was deemed that a solution of the controversy might be facilitated have been supported by a very elaborate reference to authority. We do not deem it necessary, however, to critically review the cases cited and the observations of text writers which were relied on in argument, nor to analyze all the contentions which it is asserted those authorities sustain. We say this, because, in our opinion, the matter at issue may be disposed of by the application of two well defined and elementary legal principles.

It is a doctrine firmly established that the law of a State in which land is situated controls and governs its transmission by will or its passage in case of intestacy. This familiar rule has been frequently declared by this court, a recent statement thereof being contained in the opinion delivered in *De Vaughn* v. *Hutchinson*, 165 U. S. 566, where the court said (p. 570):

"It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances. *United States* v. *Crosby*, 7 Cranch, 115; *Clark* v. *Graham*, 6 Wheat. 577; *McGoon* v. *Scales*, 9 Wall. 23; *Brine* v. *Insurance Co.*, 96 U. S. 627."

Now, in the case at bar, the courts of Connecticut, construing the will of Mrs. Clarke, have declared that, by the law of Connecticut, land situated in that State, owned by Mrs. Clarke at her decease, continued to be, after her death, real estate for the purpose of devolution of title thereto. The proposition relied on, therefore, is this, although the court of last resort of Connecticut (declaring the law of that State) has held that the real estate in question had not become personal property by virtue of the will of Mrs. Clarke, nevertheless it should have decided to the contrary, because a court of South Carolina had so decreed. This, however, is but to argue that the law declared by the South Carolina court should control the passage by will of land in Connecticut, and therefore is equivalent to denying the correctness of the elementary proposition that the law of Connecticut where the real estate is situated governed in such a case. It is conceded that, had the will been presented to the courts of Connecticut in the first instance and rights been asserted under it, the operative force of its provisions upon real estate in Connecticut would have been within the control of such courts. But it is said a different rule must be applied where the will has been presented to a South Carolina court and a construction has been there given to it; for, in such a case, not the will but the decree of of the South Carolina court, construing the will, is the measure of the rights of the parties, as to real estate in Connecticut. The proposition, when truly comprehended, amounts but to the contention that the laws of the respective States controlling the transmission of real property by will, or in case of intestacy, are operative only, so long as there does not exist in a foreign jurisdiction a judgment or decree which in legal effect has changed the law of the situs of the real estate. This is but to contend that what cannot be

CLARKE *v.* CLARKE.

ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

No. 216. Argued April 9, 10, 1900. — Decided May 21, 1900.

It is a doctrine firmly established that the law of a State in which land is situated controls and governs its transmission by will or its passage in case of intestacy.

The courts of a State where real estate is situated have the exclusive right to appoint a guardian of a non-resident minor, and vest in such guardian the exclusive control and management of land belonging to said minor, situated within the State.

THIS writ of error was procured for the purpose of obtaining the reversal of a judgment of the Supreme Court of Errors of the State of Connecticut, which, as respected real estate situated in the State of Connecticut, refused to follow and apply a judgment of the Supreme Court of South Carolina interpreting and construing the will of Julia H. Clarke.

The facts from which the legal questions presented arise are as follows:

Henry P. Clarke and Julia Hurd intermarried in New York in 1886, and immediately thereafter went to South Carolina, where they afterwards continuously resided. Mrs. Clarke died on February 10, 1894, owning real and personal property in South Carolina, and also real estate situated in Connecticut. Two daughters survived, one, Nancy B., aged five years, the other, Julia, aged about two months.

done directly can be accomplished by indirection, and that the fundamental principle which gives to a sovereignty an exclusive jurisdiction over the land within its borders is in legal effect dependent upon the non-existence of a decree of a court of another sovereignty determining the status of such land. Manifestly, however, an authority cannot be said to be exclusive, or even to exist at all, where its exercise may be thus frustrated at any time. These conclusions are not escaped by saying that it is not the law of Connecticut which conflicts with the interpretation of the will adopted by the South Carolina court, but the decision of the court of Connecticut which does so. In this forum, the local law of Connecticut as to real estate is the law of that State as announced by the court of last resort of that State.

As correctly observed in the course of the opinion delivered by the Supreme Court of Errors of Connecticut, the question as to the operative effect of the will of Mrs. Clarke, upon the status of land situated in Connecticut, was one directly involving the mode of passing title to lands in that State. This resulted from the fact that if the will worked a conversion into personalty immediately upon the death of Mrs. Clarke, as contended, it necessarily vested her executor with authority at once to sell and convey the real estate in Connecticut by a deed sufficient, under the laws of that State, to transfer title to real estate—a power which was held by the courts of Connecticut not to have been conferred. Had the executor assumed to exercise such a power, however, the validity or invalidity of a conveyance thus executed would have been one exclusively for the courts of Connecticut to determine, just as would have been the question of the sufficiency of the will to vest title. Such being the case, there is no basis for the contention that it was not the exclusive province of the courts of Connecticut to determine, prior to the execution of such a conveyance, whether or not the power to do so existed.

As further observed by the Connecticut court, whether Mr. Clarke, as executor and trustee under the will of his wife, had any power, duty or estate with respect to lands situated in Connecticut, depended upon the laws of that State. The courts of

the domicil of Mrs. Clarke could properly be called upon to construe her will so far as it affected property which was within or might properly come under the jurisdiction of those tribunals. If, however, by the law as enforced in Connecticut, land in Connecticut owned by Mrs. Clarke at her decease was real estate for all purposes, despite the provisions contained in her will, that land was a subject-matter not directly amenable to the jurisdiction of the courts of another State, however much those courts might indirectly affect and operate upon it in controversies, where the court, by reason of its jurisdiction over persons and the nature of the controversy, might coerce the execution of a conveyance of or other instrument incumbering such land.

And the cogency of the reasons just given is further demonstrated by considering the case from another though somewhat similar aspect. The decree of the South Carolina court, which, it is contended, had the effect of converting real estate situated in Connecticut into personal property, was not one rendered between persons who were *sui juris*. Nancy B. Clarke, one of the parties to the suit in South Carolina, and whom the Connecticut court has held inherited, to the exclusion of the father, under the laws of Connecticut, the whole of the real estate belonging to her sister, was a minor. She was therefore incompetent, in the proceedings in South Carolina, to stand in judgment for the purpose of depriving herself of the rights which belonged to her under the law of Connecticut as to the real estate within that State. Neither the executor or trustee under the will, or the guardian *ad litem*, or any other person assuming to represent the minor in South Carolina, had authority to act for her *quo ad* her interest in real estate beyond the jurisdiction of the South Carolina court, and which was situated in Connecticut.

It cannot be doubted that the courts of a State where real estate is situated have the exclusive right to appoint a guardian of a non-resident minor, and vest in such guardian the exclusive control and management of land belonging to said minor, situated within the State. This court had occasion to consider and pass upon this doctrine in the case of *Hoyt* v. *Sprague*, 103 U. S. 613, and, in the course of the opinion, it was said (p. 631):

"One of the ordinary rules of comity exercised by some European States is to acknowledge the authority and power of foreign guardians, that is, guardians of minors and others appointed under the laws of their domicil in other States. But this rule of comity does not prevail to the same extent in England and the United States. In regard to real estate it is entirely disallowed; and is rarely admitted in regard to personal property. Justice Story, speaking of a decision which favored the extraterritorial power of a guardian in reference to personal property, says: 'It has certainly not received any sanction in America, in the States acting under the jurisprudence of the common law. The rights and powers of guardians are considered as strictly local; and not as entitling them to exercise any authority over the person or personal property of their wards in other States, upon the same general reasoning and policy which have circumscribed the rights and authorities of executors and administrators.' (Story, Confl. Laws, secs. 499, 504, 504*a*. And see Wharton, Confl. Laws, secs. 259–268, 2d ed.; 3 Burge, Colon. & For. Laws, 1011.) And some of those foreign jurists who contend most strongly for the general application of the ward's *lex domicilii* admit that, when it comes to the alienation of foreign assets, an exception is to be made in favor of the jurisdiction within which the property is situate, for the reason that this concerns the ward's property, and not his person. (Wharton, secs. 267, 268)."

Of what efficacy, however, would be the power of one State to control the administration, through its own courts, of real estate within the State, belonging to minors, without regard to the domicil of the minor, if all such real estate could be disposed of and the administration thereof be controlled by the decree of the court of another State. Here, again, the argument relied on must rest upon the false assumption that an exclusive power which confessedly exists in the courts of one jurisdiction may be wholly destroyed or rendered nugatory by the action of the courts of another jurisdiction in whom is vested no authority whatever on the subject. It results that no person before the South Carolina court, assuming to speak for the estate of Nancy B. Clarke, represented any real property of said Nancy which

was not within the territorial jurisdiction of South Carolina, and the decree, therefore, could not affect land in Connecticut, an interest which was not before the court.

When, therefore, Henry P. Clarke, as administrator, appointed in Connecticut, of the estate of his deceased daughter, Julia Clarke, applied to the Connecticut probate court to determine who was entitled to the "real estate" owned by the intestate, it was the province of the Connecticut court to decide such question solely with reference to the law of Connecticut. Its power in this regard was not limited by the fact that in order to determine who owned the real estate, it was necessary for the court to construe the will of the mother of the intestate, and to determine what effect it had upon the status of the real estate under the law of Connecticut. Having a right to decide these questions, it was not constrained to adopt the construction of the will which had been announced by the court of South Carolina. From these conclusions it follows that because the court of Connecticut applied the law of that State in determining the devolution of title to real estate there situated, thereby no violation of the constitutional requirement that full faith and credit must be given in one State to the judgments and decrees of the courts of another State, was brought about, as the decree of the South Carolina court, in the particular under consideration, was not entitled to be followed by the courts of Connecticut, by reason of a want of jurisdiction in the court of South Carolina over the particular subject-matter which was sought to be concluded in Connecticut by such decree. *Thompson* v. *Whitman*, 18 Wall. 457; *Cole* v. *Cunningham*, 133 U. S. 107; *Grover & Baker Sewing Machine Co.* v. *Radcliffe*, 137 U. S. 287; *Simmons* v. *Saul*, 138 U. S. 439; *Reynolds* v. *Stockton*, 140 U. S. 254; *Cooper* v. *Newell*, 173 U. S. 555.

Judgment affirmed.